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No. 426

In the Supreme Court of the United States

OCTOBER TERM, 1938

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PANSTEEL METALLURGICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1947–1971) are reported in 5 N. L. R. B. 930. The opinion of the Circuit Court of Appeals, the concurring opinion, and the dissenting opinion (R. 1980–2000) are reported in 98 F. (2d) 375.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1938. The petition for certiorari was filed on October 22, 1938, and was

granted on November 21, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a Circuit Court of Appeals, having determined that the evidence supports the findings of the Board that an employer has engaged in unfair labor practices within the meaning of subsections (1) and (2) of Section 8 of the Act, may nevertheless properly set aside so much of the order of the Board as requires the employer to cease and desist from such unfair labor practices, and to withdraw recognition from the labor organization illegally dominated and supported.

2. Whether there was evidence to support the findings of the Board that respondent had refused to bargain collectively with the representative of its employees and had thereby engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act.

3. Whether striking employees whose work has ceased because of unfair labor practices and as a consequence of and in connection with a current labor dispute lose their status as employees within the meaning of Section 2 (3) of the Act for the purpose of Section 10 (c) upon their discharge for acts done as part of the strike.

4. Whether the Board has power under Section 10 (c) of the Act, and properly exercised the power in this case, to order an employer to offer reinstatement upon request to any or all of the following groups of employees who have gone on strike because of unfair labor practices committed by the employer and who:

a. During the course of the strike, engaged in a sit-down in the employer's premises and were discharged for that reason.

b. After the discharge for that reason, resisted eviction and arrest by state police officers in connection with a state injunction proceeding relating to the sit-down strike.

c. During the course of the strike did not themselves engage in the sit-down but brought food and clothing to those who did.

d. If within the above categories, were, after the conclusion of the sit-down, adjudged in contempt of court in an injunction proceeding in a state court.

5. Whether, if the Board lacked such power or if its exercise was, under the circumstances, an abuse of discretion, the court below properly set aside the order of the Board to the extent that it ordered reinstatement of employees whose only participation in the strike was their voluntary cessation of work, and as to whom there was no attempted discharge.

6. Whether, in ordering such reinstatement, the Board properly took account of a partial reorganization of operations and positions in respondent's plant made subsequent to the strike in directing that, after such reinstatement, but without disturbing the reorganization made, respondent could reduce or rearrange its staff as then constituted upon any nondiscriminatory basis, subject, however, to dismissing all persons hired for the first time after the strike.

7. Whether respondent was denied due process of law by reason of the failure of the Board to grant certain subpoenas requested by respondent at the hearing.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 95–97.

STATEMENT

Upon a charge (R. 23–24) and amended charge (R. 32–33) duly filed on behalf of the Amalgamated Association of Iron, Steel and Tin Workers of America, Lodge No. 66 (hereinafter referred to as the Union), a labor organization, the National Labor Relations Board on May 25, 1937, pursuant to Section 10 (b) of the National Labor Relations Act, issued a complaint against respondent, a copy of which, together with a notice of hearing, was

duly served upon respondent on the following day (R. 24–32). The complaint alleged, in substance, that respondent had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), (3) and (5), and Section 2 (6) and (7) of the Act (R. 31). Respondent answered on June 2, 1937 (R. 69–79), and filed an amendment to its answer on June 22, 1937 (R. 79–83). A hearing was held from June 7 to June 25, 1937, before a Trial Examiner designated by the Board (R. 95–1561). On September 2, 1937, the Trial Examiner filed an intermediate report (R. 1863–1905). Exceptions to his findings and recommendations were filed by respondent and by the Union (R. 1907–1938, 1941–1944). On March 14, 1938, the Board issued its findings of fact, conclusions of law, and order (R. 1944–1971). The facts as found by the Board may be summarized as follows:

Respondent, a New York corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of various products made from rare metals. Approximately 70 per cent of the raw materials used in its manufacturing processes originate in States other than Illinois, or in foreign countries, and a like percentage of its finished products are shipped to States other than Illinois and to foreign countries. The value of its manufactured products during 1936 was about $1,050,000. Respondent has few competitors; none in some of its fields (R. 1947).

Until early in July 1936 no labor organization existed at respondent's plant (R. 1947). At that time a group of respondent's employees organized the Union (R. 1947–1948). Shortly thereafter respondent applied for membership in the National Metal Trades Association, and hired from that organization one Johnstone, a labor spy (R. 1952–1953). Johnstone joined the Union, made inquiries as to Union membership, furnished respondent written reports of Union activities, and urged the men to use militant tactics and to strike (R. 1954–1955).

A substantial number, but not a majority, of respondent's employees joined the Union prior to September 10, 1936 (R. 1956). On that day a bargaining committee of the Union called on Anselm, respondent's superintendent, to present a proposed collective bargaining contract and negotiate for its acceptance (R. 1948). Anselm required that the committee be composed only of employees who had worked for respondent for more than five years (R. 1948). This condition was met, but Anselm, while objecting to certain provisions of the contract, stated that respondent's policy was to refuse recognition to "outside" unions (R. 1948–1949). No question was raised as to whether the Union represented a majority of the employees (R. 1948–1949).

At this September 10 meeting Anselm had suggested that the men consider a union without "outside influences" (R. 1948). Pursuant to that

suggestion Anselm and the foremen thereafter requested employees to quit the Union, and circulated a petition for the formation of an "inside" union, which the employees were urged to sign (R. 1950–1951). The attempt was abortive, and the campaign was suspended (R. 1951).

The Union committee again called on Anselm on September 21. The Union had voted to include as a member of the committee an organizer of the Union who was not an employee of respondent. Anselm, after angrily insisting that the "outside" organizer withdraw, denied that any appointment had been made with the committee, and it left (R. 1949–1950).

From November 1936 to January 1937 respondent required the president of the Union to work in a room adjoining the office of the superintendent, and forbade him to go to the plant or associate with other employees (R. 1951–1952).

By February 17, 1937, 155 of respondent's 229 production and maintenance employees, an appropriate unit for collective bargaining (R. 1955–1956), had joined the Union and designated it as their collective bargaining representative (R. 1955–1957). On that date the Union committee met twice with Anselm. At each meeting he refused the Union's demands for collective bargaining on the ground that respondent would not deal with an "outside" union (R. 1957).

Shortly after the second meeting, which took place at 2 P. M., and because of respondent's refusal to bargain collectively and other unfair labor practices, the Union began a strike which was accompanied by a "sit-down" in two of the key buildings of the plant (R. 1958, 1966).[1] A few hours after the strike began, Anselm, respondent's superintendent, and Swiren, respondent's counsel, went to each of the buildings and demanded that the men leave. Upon their refusal, Swiren announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings (R. 1958, 1961).[2]

On February 18, 1937, respondent secured an injunction from the Circuit Court of Lake County, Illinois, which required the men to vacate the buildings (R. 1958, 1794–1795). The men refused to leave, and on February 19, 1937, successfully resisted an attempt by the sheriff and his deputies to evict and arrest them (R. 1958–1959). Efforts at

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[1] Of the 93 employees named in the complaint, 28, mostly women and employees on the night shift, did not participate in the sitdown (R. 1958; p. 38 *infra*).

[2] The petition for certiorari (pp. 27–29) urged that the announcement by Swiren was not a real discharge, but a mere tactical maneuver, as the Board found (R. 1961). Because respondent claims that it had no full opportunity to be heard on that question, and in view of the decision in *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938, we do not here urge the point, believing that it is irrelevant to the validity of any portion of the Board's order.

mediation on the part of the United States Department of Labor and the Governor of Illinois were rebuffed by respondent, who continued unwilling to meet with the Union (R. 1959). On February 26 the sheriff and an increased force of deputies evicted the workers who remained in the plant and placed them under arrest (R. 1959).

The strike continued after the ejection of the strikers (R. 1960–1961). On March 3 and 5, 1937, written requests were presented to respondent for collective bargaining meetings. Each time, in a written reply, respondent refused the request (R. 1959–1960).

As soon as the strikers were ejected, respondent began preparing to resume operations. A skeleton crew of 30 or 40 began work on March 1; by March 12 the restaffing was approximately complete (R. 1959–1960). A large number of the strikers, including many who had participated in the occupation of the buildings, were individually solicited to return to work, with back pay during the period of the strike, but without recognition of the Union (R. 1959–1962). Some strikers accepted this offer and were reinstated by respondent; others refused to return without Union recognition and mass reinstatement and were still out at the time of the hearing (R. 1960–1961). New men were hired to fill the positions of those remaining on strike (R. 1959). At the time of the reopening, respondent reorganized its plant by abolishing certain departments (R. 1967–1968).

Early in April a labor organization known as Rare Metal Workers of America was organized among respondent's employees (R. 1962–1963). Its appearance was the culmination of respondent's long and determined campaign to limit its employees' means of representation to an "inside" union. It was immediately accorded various forms of support, including precipitate recognition (R. 1963–1965). The facts are more fully stated at pp. 73–77, *infra*.

In June, a number of the sit-down strikers were fined and given substantial jail sentences by the Circuit Court of Lake County for violating the injunction (R. 1959).[8]

Upon the basis of these findings, the Board concluded that respondent, by engaging in espionage upon the Union, by isolating the Union president, by urging employees to abandon the Union, and by other acts, had engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 1955); that respondent, by dominating and interfering with the formation and administra-

[8] Thirty of the employees named in the citation for contempt were reinstated by respondent, and upon their return to work their cases were continued indefinitely (R. 1760–1761, 1784, 1800–1801), although respondent's own witnesses identified many of them as leaders in the violence and testified that all had participated (see pp. 51–53, *infra*). All those who received sentences were strikers who refused to abandon their efforts to obtain collective bargaining (R. 1741–1759, 29). Included among those sentenced were 8 who had been individually solicited by respondent to return to work and had refused (R. 76, 81–82, 334, 449, 562, 563, 569–570, 586, 1074, 1241–1242, 1745, 1746, 1751–1754, 1756, 1923).

tion of, and contributing support to, the Rare Metal Workers of America, had engaged in unfair labor practices within the meaning of Section 8 (2) of the Act (R. 1962–1965); that on February 17, 1937, the Union, having been designated by a majority of respondent's production and maintenance employees as their bargaining agent, constituted the duly designated collective bargaining representative of all the employees within an appropriate unit (R. 1955–1957); and that respondent, by refusing to bargain with the Union on February 17, 1937, had engaged in an unfair labor practice within the meaning of Section 8 (5) of the Act (R. 1957–1958).[4] The Board found that respondent had not engaged in unfair labor practices in violation of Section 8 (3) (R. 1961–1962, 1969).

The Board found that to effectuate the policies of the Act, conditions should be restored to the state existing before the strike caused by respondent's unlawful conduct. This required the restoration of the strikers to their jobs. The Board fully considered respondent's contention that the strikers should not be reinstated because of their participation in the sit-down aspect of the strike and related conduct, but concluded that this did not render the normal reinstatement remedy inappro-

[4] The Board also found that respondent's refusal of the Union's requests for collective bargaining on March 3 and 5, 1937, were unfair labor practices within the meaning of Section 8 (5) (R. 1959–1960, 1962, 1969). We believe these conclusions to be correct, but need not press them, inasmuch as no part of the Board's order is dependent upon them.

priate (R. 1966–1967). The Board also found that respondent had voluntarily sought out and taken back a large number of the sit-down strikers (R. 1966–1967).[5]

The order of the Board (R. 1970–1971) requires respondent to cease and desist from the unfair labor practices found. As affirmative action which the Board found would effectuate the policies of the Act, respondent is required to bargain collectively with the Union; to withdraw recognition from and disestablish the Rare Metal Workers of America as representative of its employees for collective bargaining; upon their application, to offer immediate and full reinstatement to those employees who went on strike on February 17, 1937, dismissing, if necessary, all persons hired since that date; to make whole all strikers for losses they may suffer by reason of any refusal of their applications for reinstatement in accordance with the order; and to post appropriate notices.

On March 24, 1938, respondent, pursuant to Section 10 (f) of the Act, filed in the court below a pe-

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[5] The Board took account of the fact that reorganization of respondent's operations after the strike might make it impossible for respondent to retain all of the reinstated strikers, and accordingly directed that, after the reinstatement necessary to remedy the unfair labor practices, respondent was free to reduce its entire staff as then constituted on any non-discriminatory basis (R. 1967–1968).

tition to set aside the Board's order (R. 1–17). The Board answered, requesting full enforcement of its order (R. 18–22). On July 22, 1938, the court, Judge Treanor dissenting, set aside the entire order (R. 1980–2000). On November 21, 1938, this Court granted a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the findings of the Board that respondent on February 17, 1937, refused to bargain collectively with the duly designated representative of its employees, thereby engaging in unfair labor practices under Section 8 (1) and (5) of the Act, are not supported by evidence.

2. In holding that respondent's attempt to discharge certain employees immediately after the start of the strike and for activities which were a part of the strike, deprived the Board of power to reinstate those employees.

3. In not holding that all persons who went on strike on February 17, 1937, because of respondent's unfair labor practices continued thereafter to be employees within the meaning of Section 2 (3) of the Act for the purpose of Section 10 (c) of the Act empowering the Board to order reinstatement necessary to effectuate the policies of the Act.

4. In not holding that despite misconduct on the part of some of the strikers, the Board had the

power and, under the circumstances of this case, properly exercised its discretion to order respondent to offer reinstatement to all employees who went on strike on February 17, 1937, because of respondent's unfair labor practices.

5. In not holding that the Board could properly require respondent, in reinstating the striking employees, to distribute all available positions among such employees and the other employees hired before February 17, 1937, who resumed work, in a non-discriminatory fashion.

6. In denying enforcement to those portions of the cease and desist and affirmative provisions of the Board's order which were based upon findings, supported by evidence, of violation of Sections 8 (1) and (2) of the Act.

7. In setting aside the Board's order, and in not granting full enforcement thereof.

SUMMARY OF ARGUMENT

I

The cease and desist portions of the order directed to violations of Sections 8 (1) and (5) of the Act are valid if the findings of the Board are supported by substantial evidence. *Consolidated Edison Co.* v. *National Labor Relations Board,* Nos. 19, 25, decided December 5, 1938. The findings were so supported.

A. The Board's conclusion that respondent had violated Section 8 (1) is based upon the separate

findings that respondent: had engaged in industrial espionage; had deprived the employees of their right to freely chosen representatives by dictating who might and who might not serve on the Union bargaining committee; had attempted to thwart the right of its employees to join an organization of their own choosing by its opposition to their "outside" union and its favoring of an "inside" union; and had attempted to hinder Union organization by isolating the Union president from the other employees. The evidence supporting each of these findings, which is clear and convincing, is detailed at pp. 23–32, *infra*.

B. There is also plain and unequivocal evidence that respondent failed to bargain collectively with the representatives of its employees in violation of Section 8 (1) and (5). Two requests to bargain were made on February 17, 1937, before the strike, and each request was denied solely because respondent refused to recognize its obligations under the Act. The contrary conclusion of the court below is based upon an obvious mistake as to the sequence of events.

II

A. The Board's order of reinstatement based upon the violation of Section 8 (1) and (5) was in all respects proper. Respondent's whole course of illegal conduct was responsible for the strike, and under such circumstances the normal and proper

means by which the *status quo* may be restored is the reinstatement of the strikers to positions of employment.

1. That normal and proper remedy is not beyond the power of the Board in this case because of the attempted discharge of some of the strikers for engaging in a sit-down. First, the discharge did not remove those strikers from the class of persons described as "employees" under Section 10 (c) of the Act, which in terms gives the Board power to order reinstatement of such persons. Plainly the strikers here were within that category when the strike took place, and since the Act specifies only one way in which this statutory status may be ended—by equivalent employment elsewhere—it is reasonable to assume that Congress intended that status to continue despite an attempted discharge, at least for the remedial purposes of the Act. *National Labor Relations Board v. Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575. Once an unfair labor practice has occurred, the employer, although free to terminate the normal incidents of the employee relationship for cause, may not destroy the power of the Board to remedy his unfair labor practices, so long as the remedy required will effectuate the purposes of the Act.

Second, even if the reinstatement was not of "employees", nevertheless the order is valid. Section 10 (c) empowers the Board to require "such affirmative action, including reinstatement of em-

ployees * * * as will effectuate the policies of this Act." The clause—"including reinstatement of employees"—is clearly illustrative and not intended as a limitation. The use of the word "including" and the reports in Congress each confirm what is but in any event the normal construction—that the Board shall have plenary power to remedy the effects of unfair labor practices, including the power to require re-employment of former employees where that is required in order to effectuate the policies of the Act.

2. Nor was it an abuse of discretion for the Board to conclude that reinstatement would effectuate the policies of the Act. The Board could have effectually restored the *status quo* and dissipated the effects of respondent's unfair labor practices in no other way. Respondent cannot object to the reinstatement of the men on the ground either that they had been guilty of misconduct or had been discharged because by reinstatement of strikers in each category it has itself shown that it regards neither fact as a bar to reinstatement. Respondent was willing to reinstate all the strikers who would surrender their right to bargain through the Union. Hence, the Board's order simply obliterates the distinction which respondent itself has drawn among strikers on the basis of their willingness or unwillingness to abandon the Union. So far as the policy of the Act is concerned, there is no reason to suppose that Congress intended additional penalties under the Act for men who had

been guilty of misconduct. Employee wrongdoing is a factor to be taken into consideration by the Board, but under the circumstances of the present case it was not an abuse of discretion to order reinstatement.

3. The order of the Board properly required offers of reinstatement to all the strikers, even though respondent claimed that certain strikers were inefficient, and that it had abolished some positions by reorganizing its plant. Respondent, after complying with the order, may reduce or reorganize its staff on any non-discriminatory basis. The order simply avoids imposing on the strikers alone the burden of loss of jobs through reduction of positions—a burden which they would have shared with the non-strikers, and those who returned to work on respondent's terms, had no strike occurred.

4. The provision which requires back pay only from the time when application for reinstatement is made by the strikers and is refused by respondent is proper. The provision is so framed because until such application is made the strikers are not available for work and should not therefore be paid for loss of time. After such a refusal, however, it is only respondent's failure to recognize its obligation under the Act which prevents them from earning wages, and for that time it is proper that respondent should make the strikers whole. The payments are not penalties merely because they continue to accrue while the validity of the order is

being litigated. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Consolidated Edison Co.* v. *National Labor Relations Board, supra.*

B. The order properly requires respondent to bargain collectively with the Union upon request. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515. The evidence shows that when the other provisions of the order are complied with by the reinstatement of the strikers and the discharge of those first employed since the unfair labor practices, the Union will have a clear majority in the appropriate unit. Even if the facts were not thus clear, some such presumption would be necessary to make the Act workable. *National Labor Relations Board* v. *Remington-Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576.

III

The Board's finding that respondent dominated and interfered with the formation and administration of the Rare Metal Workers of America in violation of Section 8 (2) of the Act is supported by clear and convincing evidence, which is detailed on pp. 73–77, *infra.* On the basis of that violation, the Board properly ordered respondent to cease and desist, and to withdraw recognition from the R. M. W. A. Withdrawal is proper under the Act for two separate reasons. First, it is simply the correlative of the order requiring respondent to bargain with the Union. *National Labor Rela-*

tions Board v. *Jones & Laughlin Steel Corp., supra,* at 44–45. Second, the provision is necessary to dissipate the effects of respondent's violations of Section 8 (2). The critical fact is not the structure of the union, which respondent stresses, but whether continuance of recognition will in fact interfere with the employees' freedom of self-organization. The Board's conclusion that it would was correct. A contrary conclusion would permit respondent to continue to reap the fruits of its violations of Section 8 (2).

IV

Respondent was not deprived of due process of law by the Board's rulings on its applications for certain subpoenas. The argument is brief, and need not be restated here. See pp. 84–93, *infra.* The answer to the contention is that respondent, by its privilege of applying to the Circuit Court of Appeals for leave to adduce additional evidence under Section 10 (e) and (f), was afforded a full remedy under the Act for any erroneous action of the Board. Not having availed itself of that privilege, respondent has no ground for complaint. *Consolidated Edison Co.* v. *National Labor Relations Board, supra.*

ARGUMENT

The order of the Board, which was set aside in its entirety by the court below, divides naturally into several quite separate parts, which may, for convenience, be considered in separate points. Ac-

cordingly, we shall show, first, that the cease and desist portions of the order based upon violations of Section 8 (1) and (5) were based on findings supported by substantial evidence, and should have been enforced. Second, we shall consider the provisions of the order requiring affirmative relief to correct those violations, and show that they were plainly within the power of the Board and were designed to effectuate the purposes of the Act. Third, we shall show that the evidence supports the Board's finding that respondent had violated Section 8 (2) and that the affirmative relief required because of that violation was proper in all respects. Finally, we shall discuss respondent's contention that it was denied a fair hearing by the Board's alleged failure to grant its applications for certain subpoenas.

I

THE PROVISIONS OF THE ORDER REQUIRING RESPONDENT TO CEASE AND DESIST FROM VIOLATIONS OF SECTION 8 (1) AND (5) SHOULD HAVE BEEN ENFORCED

The court below, as we have already stated, set aside the entire order of the Board. It is far from clear why it did so. The findings of the Board that respondent had violated Section 8 (1) of the Act, and Section 8 (2), to which we shall refer in Point III, *infra,* were specifically held to be supported by substantial evidence (R. 1987–1991, 1993–1994). Yet without explanation the court refused to enforce even the cease and desist portions of the Board's order based upon these violations.

One possible explanation for the result reached by the court is that suggested in the petition for certiorari (pp. 16–21)—that the court was applying to the instant case the doctrine which it had previously advanced in *National Labor Relations Board* v. *Columbian Enameling and Stamping Co.*, No. 229, to be argued with the present case. There the court below found an act of the employees to be illegal, and as a consequence decided that the *Board* was disabled—estopped—to take *any* action to halt or correct their employer's unfair labor practices. That decision we believe to be untenable, for the reasons set out at length in our brief in that case, to which the Court is respectfully referred.

Respondent, it should be said, does not attempt to sustain this portion of the decision below on the *Columbian* doctrine. Indeed, in its Brief in Opposition to certiorari respondent does not even mention the cease and desist portions of the Board's order. Since it does, however, assert that the entire order of the Board was properly set aside, we shall deal with the contention briefly. In our view the issuance of the cease and desist portions of the order are expressly required by the Act once a violation of any of the subdivisions of Section 8 is found (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265) and the only question is whether there is substantial evidence to support the Board's finding that the unfair labor practice was committed. *Consolidated*

***Edison Co.* v. *National Labor Relations Board,* Nos. 19, 25, decided December 5, 1938. We shall show, therefore, that the Board's findings are so supported.**

A. THE BOARD'S FINDINGS THAT RESPONDENT VIOLATED SECTION 8 (1) OF THE ACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The Board's conclusion that respondent had violated Section 8 (1) of the Act, *infra,* p. 95, was based upon several separate findings: (1) that respondent had utilized industrial espionage; (2) that it had dictated who might and who might not serve on the Union's collective bargaining committee; (3) that it had announced to the Union's committee that it would not recognize an "outside" union; (4) that it had urged the employees, by pressure and threats, to form an "inside" union to replace the Union; and (5) that it had for a time isolated the president of the Union from the other employees. Each of these acts is a plain violation of Section 8 (1), and each of them is proved by substantial evidence which is, in the main, undisputed.

1. The labor spy was supplied to respondent through the medium of the National Metal Trades Association, which respondent joined on August 17, 1936 (R. 338, 1660–1661), within a short time after union organization had begun for the first time in the history of the plant (R. 165, 171–181, 185, 220–224). On the day following respondent's

application for membership,[6] Aitchison, respondent's president (R. 132), entered into an oral agreement with the Association for the employment of one Albert Johnstone in its plant (R. 374, 339–341, 344, 380–381).

Aitchison testified that Johnstone was hired to make criticisms and recommendations with respect to equipment and management (R. 339–341, 363–372). Abbott, manager of the Association, testified that Johnstone was "a confidential operative * * *

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[6] The Association had as one of its purposes assisting businesses to operate on an open shop basis, and Aitchison testified he agreed 100 per cent with their view on that question (R. 347, 342, 376). The constitution of the Association provides that in the case of a strike at the plant of any member the Association will "assist in procuring workers to replace the strikers"; that "no member shall adjust with his employees a strike or any difficulty with his employees the settlement of which involves a violation of "the constitution or principles of the Association"; and that if any member settles a "difference or strike" without the consent of the Administrative Council of the Association, he "shall repay" all moneys expended on his behalf by the Association and be subject to expulsion (Bd. Ex. 30, Art. XIII, Secs. 3, 6, 7, R. 1686–1687, 342, 346–350). The Declaration of Principles adopted by the Association prohibits its members from dealing "with striking employees as a body" (Bd. Ex. 30, R. 1693), a requirement contrary to the duty to bargain collectively with strikers imposed by Section 8 (5) of the Act. At the hearing Aitchison denied knowledge of these specific provisions in the Association's constitution and principles. But the application for membership which he signed contains at the beginning quotations from the foregoing provisions and the respondent complied fully with their terms and received strikebreakers from the Association (R. 342, 345–350, 1245–1247, 1661, 1665).

assigned to the shop," whose previous experience had been in the service of two other labor espionage agencies (R. 374, 379–382).[7] Johnstone had no qualifications for judging efficiency or management and was incompetent as a machinist (R. 374–375, 379–381, 1317–1318, 392–394, 398). Respondent represented Johnstone to the employees as a machinist and he was paid a machinist's wages, but he received additional pay and expenses for his further services either from the Association or from respondent (R. 369, 339, 343–344, 383).[8]

Johnstone's position may also be judged in the light of his activities. He immediately joined the

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[7] There can be no doubt that the Association was largely engaged in affording complete industrial espionage service to its members at this time. See Sen. Rep. No. 46, 75th Cong., 2d Sess., Pt. 3, pp. 19–20; Hearings, under Sen. Res. 266, 75th Cong., 1st Sess., pp. 809–952. On September 27, 1937, the Association notified the Senate Subcommittee that it had decided, in the early part of 1937, "to discontinue all undercover or surveillance service, all furnishing of guards, and all furnishing of employees to take the place of strikers, and pursuant to this policy all these services have been discontinued." Hearings, *supra*, pp. 5513–5514.

[8] Aitchison testified that respondent paid to Johnstone directly a total of $350 in addition to his $348 wages as a machinist, or almost $200 per month for the time Johnstone was in the plant, and that it paid nothing to the Association (R. 343–344). Abbott testified that respondent paid the Association $225 a month less Johnstone's wages as a machinist and that the Association, after deducting $25 per month as its fee, paid the remaining sum to Johnstone (R. 380–381). Respondent did not attempt to resolve this conflict in the evidence.

Union and assumed the familiar labor spy role of the "radical". He attended all the meetings, made inquiries as to union membership, and urged aggressive action, including a strike (R. 387–389, 394–395). Both Aitchison and the Association received weekly reports from him, which were destroyed after they had been read (R. 340, 359, 344, 366, 372).[9] Aitchison admitted that some of these documents dealt with union activities and named the union officers and the speakers at meetings (R. 341, 359, 360). In December 1936 respondent discontinued its use of Johnstone's services (R. 1317, 339, 344, 378–379).[10]

This evidence can leave no doubt that the Board's finding that respondent had employed Johnstone for the purposes of industrial espionage

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[9] At first Johnstone's reports were sent to him by the Association and thence to Aitchison at his home, the Association application having directed "because of the confidential nature of the Association's correspondence it is desirable that all mail sent be addressed to some particular individual" (R. 340, 344, 378, 1661, 1665). After the Association's records were subpoenaed by the Senate subcommittee, Johnstone sent his reports directly to Aitchison (R. 340, 378). After the strike Aitchison informed the Association "that the occasion for addressing communications to me at my home * * * has passed" and directed that mail be sent directly to his offices (R. 1659).

[10] The fact that the practice had been discontinued prior to the entry of the order did not, of course, affect the propriety of the cease and desist provision of the order. *Consolidated Edison Co.* v. *National Labor Relations Board*, *supra*.

is supported by substantial evidence. As we have stated, the court below so held (R. 1987, 1990–1991, 1993–1994). Nor is there doubt that this thoroughly reprehensible practice, unquestionably designed to interfere with the rights of employees guaranteed them by Section 7 of the Act, is a violation of Section 8 (1). *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49, 54–55; *Consolidated Edison Co.* v. *National Labor Relations Board, supra.* On this basis alone the cease and desist order relating to Section 8 (1) should be enforced.

2, 3, and 4. The evidence with respect to respondent's dictation of the personnel of the Union's collective bargaining committee, its open and often expressed opposition to "outside" unions, and its attempts to persuade the employees to form an "inside" union is necessarily overlapping and may be more conveniently set out as a unit. Prior to June or July 1936 there had never been a labor organization of any kind at respondent's plant (R. 165). The Union, which was organized at that time (R. 171–181, 220–225), immediately met a hostile reception designed to hinder and obstruct its efforts. President Aitchison, upon learning of its formation, discussed with the employees why they wanted a labor organization (R. 202–203, 312, 315–316). Foremen attempted to influence the newly initiated Union members to resign (R. 895–896, 738–740, 764–765).

In September 1936 respondent recalled one Anselm, who had been away from the plant for three years, to become superintendent (R. 881, 999, 1351, 1356). Anselm was aware that the employees thought that "I am back here to break up the union" (R. 468, 1352). He soon justified the reputation. Almost his first act was to build a high fence around the plant—an improvement suggested by Johnstone's reports and regarded by the employees as an anti-union measure (R. 468, 359, 239).[11]

On September 10, 1936, two days after Anselm's return, the Union, believing that it represented a majority of the employees, asked him to meet with its bargaining committee (R. 187–188, 291, 282,

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[11] The significance of the fence is explained in Fitch, John A., *The Causes of Industrial Unrest* (1924), pp. 209–210, "Where strikebreakers are to be employed, or a new force taken on, it is often advisable to have a fence or stockade around the plant. * * * It is a common belief among labor men that they were built for use in time of strike. * * * The fence makes it possible to conceal what is going on inside. If there is noise and smoke the usual inference is that work is being done. This may not be the case, but if no one can see into the plant, the illusion may be kept up and the morale of the strikers broken. Sometimes the new crew is housed and fed inside the plant. In such a case the fence undoubtedly affords valuable protection. It is useful also to keep new workers from leaving, if any should desire to do so. Sometimes a man is hired for a strike job who has no desire to take another man's place and whose first knowledge of the strike is obtained on his arrival at the plant. Such a man leaves as soon as opportunity presents itself. When he is inside a fence with armed guards all about, it is sometimes more difficult to get away than may be imagined."

285–287, 225–226). Anselm agreed to do so on condition that the committee be composed only of persons employed by petitioner for at least five years (R. 205, 252). The condition was in violation of Section 8 (1); the Act does not permit an employer to dictate who may and who may not be chosen by the employees as their representatives. The Union, however, acceded, and presented a proposed contract (R. 204–205, 252–253, 282, 283, 289, 316). Anselm read the document and stated that it was "a fair contract", and that the men would in time obtain "everything that was in the contract except union recognition." He explained that respondent was determined not to deal with "outside" unions and expressed the desire that the men form an "inside" union (R. 316, 253, 204, 209, 217, 283, 286). Anselm also expressed the view that the Act did not support the men's claim of a right to bargain through any organization they chose (R. 297). Finally, he entered into a discussion of unions in general, and terminated the conference by handing to the committee members copies of an "employee representation plan" which he desired to be substituted for the Union (R. 253–255, 290, 218, 284, 291, 316, 433–434, 867).[12]

[12] There is conflicting evidence as to Anselm's activities immediately after this meeting. He testified that he approached about a dozen of the oldest employees individually, inquired concerning their attitude toward the contract and the Union, and was told that they did not know of the contract and would like to resign from the Union (R. 1349–1354,

This recommendation of an "inside" union was followed by a vigorous campaign on the part of respondent to obtain its acceptance. Anselm himself circulated among the employees petitions calling for an "inside" union (R. 430–436, 891–893, 896–897). All of the employees were solicited to sign the petitions by foremen and other officials during working hours (R. 867–872, 877, 880–889, 911–915). The men were told they had "better" sign (R. 869, 867, 871, 880, 884, 886–889, 911–913). At the same time "employee representation plan" literature was posted on the bulletin boards and distributed among the employees by their foremen (R. 1646, 259, 284, 316, 326, 430–431). Despite its vigor, however, the campaign was unsuccessful and was temporarily dropped (R. 1350–1352, 1357–1359).

On September 21 the Union committee made its second attempt to bargain (R. 249–250, 255, 264, 327). This time the Union had selected as a member of its bargaining committee one Adelman, an organizer for the international union with which the Union was affiliated (R. 220–221, 229–230, 317). Anselm violently objected to his presence. He shouted that "I am not meeting any outsiders" and ordered Adelman to leave, which he did (R. 230–

1357, 1359). The employees in question testified, however, that they had known of the contract and had so informed Anselm, whereupon he instructed them to "quit" the Union, stating that "I want to break this thing up" (R. 413, 423–426, 437, 872–876, 896–897). Whichever version is correct is immaterial, since in either event Anselm's activities clearly violated Section 8 (1) of the Act.

231, 255–256, 263, 317, 237, 285). Anselm then repeated that respondent would not deal with "outside" unions or persons, denied that the committee had an appointment to meet him, and terminated the interview (R. 231, 256, 286, 318). Again Anselm had assumed a power to decide who could and who could not represent the employees—in violation of Section 8 (1) of the Act.

This brief summary shows that the Board's finding had substantial support in the evidence. Respondent had twice dictated who might and who might not serve on the Union's bargaining committee—thus frustrating the right to representatives of their own choosing guaranteed by the Act—and it had displayed its open antagonism to "outside" unions and its equally open favor of an "inside" union. Its acts were designed to, and had the effect of, discouraging the exercise by its employees of their right of self-organization and to be represented by a freely chosen representative in collective bargaining negotiations.

5. The evidence with respect to the isolation of Kondrath, the president of the Union, is equally clear. Kondrath was a machinist, who had worked for respondent for over 12 years (R. 171). On November 11, 1936, Anselm instructed him to work thereafter in a room adjoining Anselm's office. Anselm stated that Kondrath was not to go from this room, located in the administration building, into the plant proper, and was not to associate with

the other employees (R. 438–439, 383, 171). This isolation of Kondrath continued until the end of January (R. 440, 274). It stands unexplained in the record save as an obvious attempt to deprive the Union members, at a critical point in the organization's existence, of all contact with the man they had selected as their leader. It was designed to weaken the morale of the Union members and to show respondent's opposition to that organization, and was a violation of Section 8 (1).

B. THE BOARD'S FINDING THAT RESPONDENT VIOLATED SECTION 8 (5) OF THE ACT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The court below held that there was no evidence to support the finding that respondent had refused to bargain collectively with the representative of the majority of its employees in violation of Section 8 (5). This determination, however, was based solely upon the ground that the employees had been discharged when the request was made (R. 1987). That ground misconceives the correct sequence of events. Actually, it is undisputed that the refusals to bargain on February 17, 1937, occurred several hours prior to the strike and the subsequent purported discharge.

A brief statement of the events of that day will show both the correct time sequence and the refusal to bargain. About 9 A. M. the Union committee called on Anselm and requested a meeting with the management for the purpose of collective bargaining (R. 257, 258). Anselm replied that such a meet-

ing would be futile since respondent would not recognize an "outside" union (R. 257). Upon the committee's insistence, Anselm conferred with President Aitchison, who refused even to meet with the committee (R. 257, 270, 271, 289).

At Anselm's suggestion, the committee returned at 2 P. M. Again they met the same refusal to bargain. Anselm stated (R. 258, 289):

> It is still the same. We can't recognize an outside union. If you fellows want to call it a shop committee, why we will give you collective bargaining; but under the leadership of outsiders, the Amalgamated Association of Iron, Steel, and Tin Workers, we will not.

It was only after, and as a direct result of this last manifestation of respondent's constant and intransigent determination to deny its employees any freedom of self-organization and all right to bargain collectively, that the strike occurred.

The above statement makes it plain that respondent refused to bargain with the Union, and that it did so solely because of its insistence that the employees be not represented by a labor organization with national affiliations. Refusal on that ground was a violation of Section 8 (5) of the Act. Respondent did not object to the demands which the Union made, nor did it question the authority of the Union to represent its employees. Indeed, the Board found that the employees paid on an hourly

basis, exclusive of engineering, laboratory, supervisory, and clerical employees, constituted a unit appropriate for collective bargaining (R. 1955–1956), and respondent stipulated that on February 17, 1937, there were 229 employees in this unit, 155 of whom were members of the Union (R. 188, 1004, 1338–1343, 1656–1659, 1859). The Board found, therefore, that on that date the Union was the duly authorized exclusive representative of all of the employees in the appropriate unit (R. 1956–1957). Respondent's refusal to bargain must have been, and was, based solely upon an outright refusal to recognize its obligations under the Act.

We submit, therefore, that the provisions of the order requiring respondent to cease and desist from its violations of Section 8 (1) and (5) are based upon findings which are supported by substantial evidence, are valid and proper, and should be enforced.

II

THE PROVISIONS OF THE ORDER REQUIRING REINSTATEMENT OF THE STRIKERS AND OTHER AFFIRMATIVE ACTION BY RESPONDENT BECAUSE OF ITS VIOLATIONS OF SECTION 8 (1) AND (5) ARE VALID AND SHOULD BE ENFORCED

Paragraph 2 of the Board's order requires, as affirmative action which the Board found would effectuate the purposes of the Act, that respondent offer, upon application, immediate and full reinstatement to all persons who went on strike on February 17, 1936, with back pay from the date of refusal of any such application, dismissing, if neces-

sary, all persons hired since the strike began. Respondent is also required to bargain collectively, upon request, with the Union as the exclusive representative of its employees. Each of those provisions of the order is attacked by respondent, and each was set aside by the court below. Each, we believe, is valid and entitled to enforcement.

A. THE BOARD'S ORDER PROPERLY REQUIRED RESPONDENT TO OFFER REINSTATEMENT UPON APPLICATION TO ALL THE STRIKERS WITH BACK PAY FROM THE DATE OF REFUSAL OF ANY SUCH APPLICATION

The basis for the reinstatement order was the finding by the Board (R. 1966) that the strike was the direct and immediate result of respondent's whole course of conduct in refusing to recognize its obligations under the Act (see pp. 27–31, 32–33, *supra*). Reinstatement is the normal and proper remedy in cases of strikes caused or prolonged by an employer's unfair labor practices. This is especially true where, as in the instant case, the strike would not have occurred or might have terminated but for the employer's illegal refusal to negotiate with the representatives of his employees and where an attempt to dissipate the effects of such a refusal would be futile unless those to whom the duty to bargain was owed were returned to positions of employment. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2d),

certiorari denied, 304 U. S. 579; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9th).

There can be no doubt that the Board was correct in charging respondent with responsibility for the strike. The strike was the culmination of many months' violation of the Act (R. 288). As a result, prior to February 17, 1937, the Union had voted to its bargaining committee the power to take all steps necessary to obtain collective bargaining (R. 257–258, 269, 288). In accordance with that power, immediately after its second unsuccessful attempt to bargain with respondent on February 17, the committee decided upon a strike (R. 258, 271, 298, 329). The purpose of the strike was recognized by all the employees to be to force respondent to observe the law by bargaining with the Union (R. 273, 298, 332, 408–409, 523). The expectation was that this purpose would be accomplished by a sit-down strike of but a few hours' duration (R. 299).

Had respondent agreed to cease its violations of the Act, the strike would certainly have immediately terminated, and there would have been no vio-

lence and no damage to respondent's plant. Respondent chose, however, to continue its unrelenting efforts to destroy the Union. About four hours after the strike began Anselm and Swiren, respondent's superintendent and attorney, respectively, ordered the strikers out of the two buildings. Upon their failure to obey, Swiren announced that all employees within the buildings were discharged (R. 1780–1781, 277–278, 302, 333). The apparent purpose of this maneuver, as subsequent events showed, was not permanently to eliminate the sit-down strikers from respondent's employ, but only to aid respondent's application for a mandatory injunction requiring the strikers to vacate the buildings, which respondent obtained on the following day, upon application to the Circuit Court of Lake County, Illinois. This writ was served on the men, who refused to comply. On February 19 an attachment for contempt was issued and served (R. 1147, 1157, 1171–1172, 1782, 582–583). The men successfully resisted an attempt to evict them on February 19, but were ousted on February 26 (R. 1141, 1143, 1089–1105, 1174, 1782–1783).

Respondent continued unwilling at all times to settle the controversy by negotiation. During the time the men were in the buildings respondent repeatedly rejected efforts by the Governor of Illinois, the Mayor of Waukegan, and by Federal and state mediators who tried to persuade it to negotiate with the Union (R. 1503, 1508–1510, 491–503). Respondent was willing to meet with the strikers

"only as ex-employees, not as members of a union or a committee of the union" (R. 1507).

So much, we believe, is conceded by respondent. Its objections to the order do not deny that in the usual case of a strike resulting from unfair labor practices reinstatement would be the normal remedy. The present case is alleged to be different in that (1) the purported discharge on February 17 of those of the strikers who were engaging in a sit-down strike terminated the Board's power to order their reinstatement; and (2) even if the Board had power to order reinstatement of the strikers so discharged, to require it under the circumstances of this case would not effectuate the policies of the Act. Respondent further objects that even if reinstatement was valid and proper, the order of the Board improperly failed to take account of certain reductions of respondent's staff after the plant reopened and its claim that seven of the strikers were inefficient. Finally respondent objects to the form of the order requiring back pay. We believe each of these contentions is without merit.

1. *It was within the Board's power to require reinstatement of the strikers*

Respondent's argument that the Board lacked power to order reinstatement of some of the strikers is based upon the ground that its power was ended by the discharge of these strikers after the unfair labor practices and after the strike began. There are two answers. In the first place, the discharge did not remove the strikers from the class of persons

described as "employees" in Section 10 (c) of the Act, which in terms gives the Board power to require reinstatement of such persons. In the second place, the Board was empowered to reinstate the strikers even if they ceased to be such persons as are described as "employees" within that section.

Before discussing those points, however, it should be noted that respondent's argument is inapplicable to a substantial number of the persons affected by the Board's order. Of the employees who were ordered reinstated, 28 were not in the buildings at the time of Swiren's announcement that the occupants were discharged.[12] So far as

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[12] Of these 28 it affirmatively appears or is admitted by the pleadings that the following 12 neither participated in the sit-down nor assisted those who did: Bissonnette (R. 81–82, 1047, 1049), Butterfield (R. 81–82), Fellens (R. 81–82, 771–772), Gartley (R. 81–82, 779–783), Hoff (R. 81–82, 1056–1057, 1216), Vivian Johnson (R. 81–82, 824), Leskovec (R. 81–82, 662), Bessie Luczo (R. 81–82, 785–786), Mesec (R. 81–82, 802–803), Recktenwald (R. 81–82, 806–807), Seifert (R. 81–82, 762), Taylor (R. 81–82, 852–853); the following 16 did not take part in the sit-down but brought food and clothing to those who did: W. D. Crump (R. 1785, 463–465), Fagan (R. 1785, 674–677), Fulkerson, Jr. (R. 1785, 704–705), Furlan (R. 1785, 1036–1038), Evelyn Graimer (R. 794–796), Grom (R. 1785, 697–700), Holm, Sr. (R. 469), Otto Latz (R. 1785, 732), Lima (R. 1785, 900–903), Magness (R. 1785, 708–709), Makovec (R. 1785, 743–744), Mondro (R. 1785, 660–661), Puntarich (R. 1785, 737–738), Raynor (R. 1785, 720–727), Starovich (R. 1785, 666–669), Mike Zelenick (R. 1785, 748); as to a 29th, Weatherhead, the record fails to show he in any way participated. While the conduct of the 16 may have been a technical violation of the state court injunction, it was testified that the men did not consider it to be so as the various officers of the law sta-

the *power* of the Board is concerned, therefore, there can be no question with respect to these 28."

a. *The strikers to whom the attempted discharge applied retained the status of "employees" for the purposes of Section 10 (c) of the Act*

Section 10 (c) of the Act provides that, upon finding unfair labor practices to have occurred, the Board shall require "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." No explanation of the term "employee" is contained in Section 10 (c), but that term is defined in Section 2 (3) of the Act to include—

> any individual whose work has ceased as a consequence of, or in connection with any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *.

There can be no doubt, as we have shown above (pp. 36–37), that the employees here involved ceased work in connection with a current labor dispute and

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tioned around the plant supervised and cooperated in all bending in of supplies (R. 903). Many of those who brought food and clothing had husbands, sons, or fathers in the building. Their attitude in this regard was expressed by one witness, "I didn't like to see them freeze to death or starve to death" (R. 469).

[14] The court below did not state why it excluded these 28 from reinstatement. As the dissenting opinion pointed out, absent a determination by the court that the Board abused its discretion in ordering their reinstatement, the Board's order should have been enforced (R. 1991).

as a consequence of unfair labor practices, and therefore retained their statutory status as employees. Respondent is forced to contend that this status was terminated by it for purposes of Section 10 (c) after the unfair labor practices, but before the conclusion of proceedings under the Act.

But the Act specifies only one way in which this statutory status may be ended—by the obtaining of "any other regular and substantially equivalent employment".[15] It is not reasonable to assume that Congress, having specified one way in which the status might be brought to an end, intended that it might be ended by a discharge growing out of the dispute itself. Much more likely is the contrary assumption that had it so intended it would have specifically so stated (*United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318, 336; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 231), particularly as it could have done so by the simple addition of but three words—"or been discharged".[16]

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[15] Judge Treanor, dissenting, stated (R. 1993):

"The reasonable construction [of Section 2 (3)] is that one who is an employee at the inception of a labor dispute or unfair labor practice, and ceases work because of either, remains an employee as long as the labor dispute is "current" or as long as the unfair labor practice is cognizable by the Board as an obstruction to commerce."

[16] Both the comprehensiveness of the words "employee" and "labor dispute" as defined in Section 2 (3) and (9) of the Act and the explanation for the inclusiveness of the statutory scheme emphasize the inappropriateness of permitting a mass discharge under strike conditions to remove groups of persons from the jurisdiction of the Board. The Senate

This has been explicitly recognized by the only court which has passed upon the argument now advanced. In *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575,[17] the Circuit Court of Appeals for the Ninth Circuit stated (94 F. (2d) at 145):

> There is no limitation in the statute that individuals whose work has ceased as a consequence of a current labor dispute are employees only if they were not discharged prior to the effective date of the act. The reading into the statute of such a limitation would constitute an abuse of power.

Respondent attempts to distinguish the case on the ground that there the discharge was not for "good cause." If that were relevant, it is a sufficient answer to it that the discharge in the *Carlisle* case occurred prior to the effective date of the Act, and consequently was for "good cause" no matter what inspired it.

Moreover, it should be noted that we are here concerned only with the power of the Board to re-

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Report states as reasons for its broad definitions (p. 6), "If this bill did not permit the Government to exercise complete jurisdiction over such controversies (arising from unfair labor practices) the Government would be rendered partially powerless, and could not promote peace in those very widespread controversies where the establishment of peace is most essential to public welfare."

[17] The *Carlisle* decision is noted with approval in Michigan Law Review, Vol. 37, p. 144 (Nov. 1938), and Ohio State Law Journal, Vol. 4, p. 372 (June 1938).

instate employees who have ceased work in connection with a current labor dispute and because of an unfair labor practice, and who, moreover, have been discharged because of acts which would certainly never have been committed but for the employers' violation of the statute.[18] Under such circumstances we think Congress intended the statutory status of employees to continue despite such a discharge, "for the remedial purposes specified in the Act." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347. It is not necessary to decide whether, prior to the time of the commission of an unfair labor practice, a discharge for cause may entirely terminate the employment relationship. But once an unfair labor practice has occurred, the employer,

[18] We are not here concerned with the situation in which employees are discharged for reasons unrelated to the strike, nor with the situation in which the strike was not caused by an unfair labor practice. Nor are we concerned with the obligation of the employer to bargain with the representative of discharged employees under Section 8 (5). None of these situations is now before the Court. While we believe that the same consequences would follow in each case, we address ourselves here solely to the significance of the word "employee" in Section 10 (c) in the circumstances of the present case. It is true that in the instant case the Board found that respondent violated Section 8 (5) on March 3 and 5, 1937, after the assumed discharge of the strikers (R. 1959–1960, 1969). Although we believe the Board's conclusion was correct, it is not necessary to urge the matter in this Court since respondent had twice refused to bargain on February 17, 1937, prior to the discharge, and no part of the Board's order is dependent upon the additional findings of subsequent refusals to bargain.

although he is free to terminate all the normal incidents of the employment relationship, for cause, may not destroy the power of the Board to take such action as would be necessary to restore the situation as it existed prior to the employer's breach of the statute, and thus to remedy the unfair labor practices. Compare *Black Diamond S. S. Corp.* v. *National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579.[19] As a matter of discretion, it may find, for particular reasons and in particular cases, that it should not order reinstatement; as a matter of *power,* such persons remain within the compass of permissible orders of the Board found desirable to

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[19] In that case, the employees went on strike prior to any unfair labor practices by their employer. During the strike, on December 14, the employer refused, in violation of Section 8 (5), to bargain collectively. The Board required reinstatement of the strikers to positions available on that date. In enforcing the Board's order, the Second Circuit said (94 F. (2d), at 879): "When, on December 14, 1936, the Black Diamond refused to bargain with the certified bargaining agent of its employees, it violated the act and became subject to such orders of the Board 'as will effectuate the policies of this Act.' Section 10 (c), 29 U. S. C. A. § 160 (c).

"From the date of the respondent's first unfair practice, its ordinary right to select its employees became vulnerable. * * *

"* * * under section 2 (3) of the act, 29 U. S. C. A. § 152 (3), the striking engineers still remained employees, and to 'effectuate the policies of this act,' section 10 (c), 29 U. S. C. A. § 160 (c), no more is done than to maintain the status quo which existed on December 14, 1936, as against unfair labor practices which occurred thereafter."

restore the *status quo* and effectuate the policies of the Act.

This construction certainly is in accord with the terms of the Act. Nor does it in any way limit any of the normal rights of an employer except so far as is necessary to enable the Board to remedy his violations of the statute; therefore no constitutional issue is involved. The word "employee" is obviously and purposely used by Congress in the Act to refer to a defined class of persons for whom no familiar short term exists.[20] There is no attempt to invest those persons whose status is fixed for the purposes of the remedies provided in Section 10 (c) with any of the other usual characteristics of employees as they are understood apart from the Act. All the conventional incidents of the employment relation may be freely terminated by a discharge for cause, even after an unfair labor practice. Our position is well summarized in the dissenting opinion below (R. 1993):

> The obvious purpose of the Act is to continue the employee relationship as an instrumentality to be used by the Board as the basis of a reinstatement order or other affirmative action and to avoid any controversy, such as in the instant case, respecting the continuance of the relationship.

b. *The Board's order was valid regardless of whether the men remained employees*

We believe, for the reasons stated above, that the strikers remained employees within the meaning of

[20] Cf. Freund, *Legislative Regulation* (1932), pp. 218–219.

and for the purpose of Section 10 (c) of the Act, assuming their discharge from other incidents of the employee relationship, and that consequently the power of the Board to require their restoration to positions in the plant is plain. But even if, by reason of respondent's attempted discharge of some of the strikers, these men became ineligible under the Board's power to order the "reinstatement of employees" (Section 10 (c)), we submit that the Board's order is nevertheless valid as to them.

Section 10 (c) empowers the Board to require "such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The subordinate clause is one of illustration, not of limitation upon the broad power of the Board to require "such affirmative action * * * as will effectuate the policies of this Act." It is not a part of an enumeration implying exclusion of any similar authorization. The word "including" imports but a particular instance in a general class. See *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 125n. Cf. *Springer* v. *Philippine Islands*, 277 U. S. 189, 206. The legislative history of the section shows that this was the sense in which "including reinstatement of employees" was used in this statute. The report of the Committee on Labor of the House of Representatives (H. Rep. No. 1147, 74th Cong., 1st Sess.) points out that upon a finding that anyone has engaged in an unfair labor practice, the Board will issue an order (p. 23)—

> requiring such person to cease and desist from such unfair labor practice and to take such affirmative action as will effectuate the policies of the bill; i. e., as defined in section 1, to encourage the practice of collective bargaining and to protect the exercise by the worker of full freedom of association, self-organization, and designation of representatives of his own choosing. The orders will of course be adapted to the needs of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices. The most frequent form of affirmative action required in cases of this type is specifically provided for, i. e., the reinstatement of employees with or without back pay, as the circumstances dictate * * *.

From this considered statement it appears that the specific power to reinstate employees was stated in the Act only because it was contemplated that this remedy would very frequently be appropriate and be exercised. The statement makes it clear that the power of the Board to require affirmative action exists as to all types of violations, that the appropriateness of its exercise is to be determined by a consideration whether, in the circumstances of the particular case, it is found to effectuate the

policies of the Act set forth in Section 1. To impute an intent that "reinstatement of employees" modifies the general power to effect industrial peace by encouraging collective bargaining and protecting freedom of self-organization would do violence to the well-accepted rule that remedial legislation is to be liberally construed to obtain the ends which Congress sought to achieve. *United States* v. *Anderson,* 9 Wall. 56, 65, 66; *Miller* v. *Robertson,* 266 U. S. 243, 248; *The Arizona* v. *Anelich,* 298 U. S. 110, 123.

Under the present point we are dealing, for purposes of argument, not with "reinstatement of employees" but with reemployment of former employees. Surely the express grant to order the former cannot be construed to eliminate power to require the second any more than it eliminates power to require the other forms of affirmative relief enumerated in the House Report when they are found by the Board, in administering the Act, to be necessary to effectuate its policies. There is no ground to suppose that if an order requiring employment to be given to persons who are no longer employees will, in some circumstances, achieve the purposes of the Act, Congress nevertheless intended to make such achievement impossible.

Whether, and in what cases, reinstatement of discharged employees will in fact effectuate the policies of the Act is a question of propriety of the exercise of the power; reinstatement might not be proper in all cases. The question whether the

remedy is appropriate in this case we deal with in Part 2, *infra*. Here we simply point out that respondent's claim that Section 10 (c) should be so narrowly construed as to deny to the Board the power to reinstate discharged employees at any time, under any circumstances, even if reinstatement would effectuate the policies of the Act, is inconsistent with the purposes of the statute and is supported by nothing in the legislation or its history.

2. *The reinstatement of the strikers will effectuate the policies of the Act*

Respondent also contends that if the Board has the power to reinstate the strikers, it was improper to exercise the power in the present case. Two arguments are advanced: that the Board should not have ordered reinstatement of employees who had engaged in a sit-down strike and violently resisted attempts of law-enforcement officials to enforce the processes of the state court; and that the Board should not reinstate men who were discharged under the circumstances of this case (see p. 37, *supra*).

Respondent undertakes, of course, a heavy burden. The character of the affirmative relief to be ordered, or whether any is to be ordered at all, is peculiarly within the "judgment and discretion" of the Board, and will not be reviewed by the court unless plainly unreasonable. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Under the circumstances

of this case, reinstatement was essential to restore the *status quo* and dissipate the effects of respondent's unfair labor practices, especially when it is remembered that none of the things respondent raises as a bar to reinstatement would have occurred but for respondent's violations of the law.

Respondent itself supplies the answer to its contention that the strikers who had engaged in the illegal acts were not qualified to be employees with the legal incidents which flow from that relationship under the Act. When the plant reopened, respondent tried to persuade to return to work the very persons whose reinstatement was ordered by the Board. True, only those who would surrender their right to bargain through the Union as their representative were permitted to return. Respondent readily reinstated all strikers who would return on these terms and conceded at the hearing that it did not exclude anyone because of his participation in the strike, the occupation of the plant or resistance to the law enforcement officers, or because of the discharge (R. 346, 831, 1215–1216, 1254–1255, 1297, 1910). Aitchison, respondent's president, testified that respondent "took back as many people as would come back" (R. 346).[21] It actively solicited 53 of the sit-down strikers to return, including 15 who refused thus to surrender

[21] With four exceptions every striker who was willing to return to work without recognition of the Union was reinstated, and respondent admitted that the four were not excluded because of any conduct during the strike (R. 1215, 1254, 1216, 1299). The respondent's attitude towards the

their rights under the Act and who are named in the Board's complaint (R. 76, 81–82, 1216, 446–447, 449, 458, 460, 563, 569–574, 579–580, 586–587, 618, 621, 831, 907). Indeed, of the strikers whom the Board ordered reinstated, in addition to the 15 sit-down strikers, at least 7 who did not participate in that feature of the strike were also individually solicited to return and refused (R. 76, 81–82, 731, 734–735, 794–796, 779–783, 824, 762, 452–453, 801, 803, 805, 808, 1074, 1923). All were offered wage increases and back pay for the time the plant was closed, and the strikers who accepted were given such increases and back pay. Among those reinstated by respondent when they agreed to return without recognition of the Union were men who had taken leading parts in the resistance to the deputies and consequent damage to respondent's

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conduct of the "sit-down" strikers appears from the following testimony of Anselm:

"Q. Now, aside from these four men, or these three men and Hoff, every man who was in the sit-down who applied for reemployment was rehired, was he not?

"A. That is my belief. I interviewed a great many men.

"Q. How many does that make who applied for reemployment and were rehired by the company who had been in the sit-down?

"A. At least 37.

"Q. Were any limitations or conditions placed upon the men who came back and asked for re-employment who had been in the sit-down?

"A. None whatever" (R. 1216).

A notice was put in the paper by petitioner offering men who returned by March 12 pay for the period the plant was closed (R. 783, 798–799, 809, 821, 813, 819, 1333, 1705). The testimony of Elmer Luke is typical of the manner in which

property.[22] On the other hand, 28 of the persons named in the Board's complaint did not participate in the sit-down, and twelve took no part whatever in any of the strike activities (*supra*, p. 39).

Nor did respondent distinguish between those who disobeyed the injunction and those who had not. Although the testimony of respondent's own witnesses showed those reinstated violated the injunction to the same extent as anyone else, the contempt citations against them were continued indefinitely and only those who refused to abandon the strike received sentences (*supra*, p. 10).

The inference is plain. Respondent's opposition to the reinstatement provisions is not based on the sit-down, the violation of the injunction, or the discharge, but on its desire to prevent the Union, now

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respondent greeted the sit-downers who returned. Luke testified that although he was in the plant from February 17 to 26, after reading the advertisement in the paper:

"I went back and had a talk with Mr. Anselm, and he said he would call me when he needed me.

"Q. He did not say that he would not take you back because of what you had done, did he?

"A. No, sir; he didn't. He shook hands and he said, 'All is forgiven' (R. 831)."

[22] Thus Chester Hook testified he squirted a foamite fire extinguisher at the deputies, threw iron spools, about 5 or 6 inches in diameter and weighing a pound and a half, at them, and broke windows (R. 1133–1134, 1137, 1139); Milton Sladek, that he squirted water at the deputies with the fire hose, threw things, broke windows, and pulled out a shutter, window and all (R. 1141–1142, 1144); Arthur Sladek, that he threw pieces of steel or anything he could lay his hands on (R. 1148, 1151); John Germer, that he threw anything that was handy and broke windows (R. 1175); that all the others

virtually eliminated from the plant, from having an opportunity to regain its position there. Of the employees remaining in strike at the time of the hearing, 22 had been in respondent's employ from 15 to 25 years, 23 of them from 7 to 15 years (R. 651, 906, 628, 201, 412, 462, 467, 708, 736, 634, 747, 731, 540, 631, 643, 636, 648, 685, 751, 642, 184, 598, 556, 662, 792, 665, 448, 460, 614, 655, 756, 753, 619, 513, 527, 531, 611, 603, 486, 544, 946, 171, 596, 600, 552). Many of them were highly skilled in handling rare metals and in view of the fact that respondent has no competitors in some of its fields, would not easily be replaced (R. 133–138, 141–145). The record affords no explanation why respondent's attitude of "All is forgiven" (R. 831) does not extend at least to the employees not discharged and not guilty of violence or any other participation in the strike, except that they would not return to work on respondent's terms—without recognition of the Union.[23]

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in the plant engaged in similar conduct (R. 1141, 1134, 1148, 1151). Each one of these men, as well as each of the other sit-down strikers who returned to work, was not only paid by petitioner his full wages for the time he was occupying the plant, but was also given a raise upon his return, and was working for respondent at the time of the hearing (R. 1138, 1136, 1145, 1152, 1175, 926, 992, 1331–1333, 1705).

[23] Plainly the Board's conclusion that respondent had been guilty of no violation of Section 8 (3) of the Act is irrelevant. The ground for that conclusion is simply the technical one that no application for reinstatement had been made. The Board stated (R. 1961–1962):

"It might be argued that since the Union was demanding as a condition to reinstatement only something to which

So far as respondent is concerned, therefore, the reinstatement of the strikers not already reinstated will simply have the effect of obliterating the distinction which respondent itself has drawn among the strikers not according to whether they engaged in violence, or disobeyed the injunction, or were discharged, but according to whether or not they would abandon their Union—a result which accords with the express intention of the whole Act and of Section 10 (c) particularly. Respondent also urges, however, that the reinstatement is contrary to the policy of the Act in the larger view—that it will not effectuate the policies of the Act because it will encourage sit-down strikes and violence. The suggestion is rather surprising, coming as it does from one who has already afforded not only precisely the reinstatement which is required but also with back pay and raises, to those participants in the conduct it condemns who were willing to accept respondent's disregard of the Act. But irrespective of its source, the suggestion is without merit.

Congress did not intend that the conduct of employees be either approved or condemned in a pro-

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they were entitled under the Act—recognition and collective bargaining—the respondent in illegally refusing this demand should be considered as discriminatorily refusing to reinstate the strikers. We do not take this view. So long as the employees were unwilling to return to work under the conditions existing at the time the strike was called, however just the grounds on which their position was based, it cannot be said that the respondent was refusing to reinstate them.

"While the record gives rise to a reasonable speculation that the respondent would have refused to take back the

ceeding under the Act.[24] Correction and prevention of employee misconduct was intentionally left to other statutes and other tribunals, with the full realization that existing sanctions were sufficient and that the Board should not be required to pass on charges of misconduct by employees.[25] Indeed,

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strikers in a body, such a speculation, in the absence of a clear-cut request for reinstatement, cannot support a finding that the respondent refused to restore them to their jobs. We will dismiss the complaint in so far as it alleges that the respondent committed unfair labor practices within the meaning of Section 8 (3) of the Act by discharging and refusing to reinstate the strikers."

[24] Misconduct by employees is, of course, a factor to be considered by the Board in exercising its judgment and discretion. The Board has held that misconduct may be such as to warrant withholding the normal reinstatement remedy. *Kentucky Firebrick Co.*, 3 N. L. R. B. 455, enforcement granted, 99 F. (2d) 89 (C. C. A. 6); *Republic Steel Corp.*, 9 N. L. R. B., No. 33, decided October 18, 1938, at p. 175. The considerations which impelled the Board to reach a contrary conclusion in the present case are fully set forth in its decision, that respondent's open defiance of the Act had precipitated the conflict as an alternative to the orderly processes of collective bargaining which the employees had attempted to pursue; and that respondent, by reinstating a large number of the sit-down strikers, had shown it did not regard the misconduct of the employees as rendering them unsuitable for employment.

[25] Compare the following statement by the Committee on Education and Labor of the Senate (Sen. Rep. No. 573, 74th Cong., 1st Sess.) in rejecting the proposal that the Board have power to prevent burdens to commerce occasioned by employee action (pp. 16–17):

"Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now

the instant case demonstrates how adequate the sanctions are against misconduct such as that here involved, and, by the same token, how unnecessary it is in this case to permit the effects of respondent's unfair labor practices to continue simply to add a further penalty. Of the 37 strikers who were held in contempt of the state court, 24 were fined $100 and sentenced to 10 days' imprisonment, 11 were fined $150 and sentenced to 120 days' imprisonment, and 2 were fined $200 and sentenced to 180 days' imprisonment (R. 1738–1761). These sentences were affirmed on appeal to the Appellate Court of Illinois for the Second District (295 Ill. App. 323) and leave to appeal to the Supreme Court of Illinois was denied on October 17, 1938. Even more severe penalties were available under the Criminal Code of Illinois had the public prosecutor deemed it desirable to invoke them.

The solution provided by Congress in the present Act for the avoidance of strikes, and the unpredictable consequences thereof, is the fostering and encouragement of collective bargaining as a means

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adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. * * * In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. * * * The only results of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with countercharges and recriminations that would prevent it from doing the task that needs to be done."

This section of the report was quoted with approval by the Committee on Labor of the House of Representatives. H. Rept. 1147, 74th Cong., 1st Sess., p. 16.

for the peaceful adjustment of disputes between employers and employees. Sit-down strikes, which reached their peak in 1936 and the first part of 1937, were most frequent in newly unionized industries which had no background of collective bargaining.[26] These sit-down strikes were part of the pronounced period of industrial strife which is largely attributable to failure of employers to accept the Act prior to this Court's decision in the *Jones & Laughlin* and companion cases. Those decisions of this Court were immediately reflected in an increased resort to the Act and to the processes of collective bargaining and a corresponding sudden decline in the number of sit-down strikes. At the present time the sit-down has virtually disappeared.[27]

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[26] Lois McDonald, *Labor Problems and the American Scene* (1938), p. 491; Monthly Labor Review, August 1938, p. 362. Experience since the early part of 1937 has demonstrated that in the previously unorganized mass production industries when collective bargaining finally took place between strong international unions and employers, contracts were entered into outlawing the sit-down strike as a weapon of labor. Such contracts have been signed in the rubber, electrical, glass, tile and automobile industries. Agreements on file with the United States Bureau of Labor Statistics, Division of Industrial Relations.

[27] The number of sit-down strikes reached a total of 170 in March 1937 and there were 52 and 72 in April and May, respectively, of that year. In June, the second month after the decision in the *Jones & Laughlin* and related cases, there was a sudden drop to 29, which was followed by a steady decline until December. After that month the number of sit-down strikes in any month never exceeded 10. In August

So far as the National Labor Relations Act is concerned, the way to prevent and discourage sit-down strikes, as well as all strikes, is through collective bargaining, not by punishing strikers.[28] It flies in the very teeth of the whole policy of the Act and its constitutional basis as a regulation of commerce to contend that, faced with clear violations of the Act, the Board must withhold the only remedy which can encourage collective bargaining in this case by dissipating the effects of respondent's unfair labor practices because, after such practices were committed, some of the strikers engaged in acts illegal under state law, for which they

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1938, the last month for which figures are available, there were but 3 sit-down strikes involving 332 workers.

The decrease is even more clearly shown by a comparison with the number of strikes as a whole. In March 1937 sit-down strikes constituted 28 per cent of all strikes. In April and May the percentage decreased to 10 and 12, respectively. In June it had decreased to 5 and with the sole exception of February 1938 in which the percentage increased to 6, it has never reached higher than 5 per cent again. See Monthly Labor Review (U. S. Bureau of Labor Statistics), August 1938, pp. 360–361; November 1938, p. 1039, and compiled sit-down strike statistics of the Bureau, January to August 1938.

See also statement of Elmer F. Andrews, then Industrial Commissioner of the State of New York:

"All along, the experienced leaders, both A. F. of L. and C. I. O., have exerted their influence to promote discipline and responsibility among the minor officials and the rank and file. The sharp drop in the use of the sit-down strike method after the Supreme Court's upholding of the Wagner National Labor Relations Act indicates, to my mind, that, if labor is given an orderly method of appeal for justice, under the law, it will not resort to extra-legal methods."

have been punished under that law. The Act was not enacted as an instrument to prevent strikes other than by protecting the right to engage in genuine collective bargaining. It is not punitive in its remedies against employers (*Consolidated Edison Co.* v. *National Labor Relations Board,* Nos. 19, 25, decided December 5, 1938); nor should the framing of remedies under it be made with an eye to the penalization of employees. The normal and effective operation of the Act is the method provided by Congress for preventing consequences of the denial to employees of the rights guaranteed them in the Act. The men reinstated here were denied their rights and to effectuate the policies of the Act the order restores the situation as it was before such denial.

Finally, there can be no doubt that, as a practical matter, it is reinstatement, and that alone, which will restore to the employees their confidence in the procedure of the Act and in the processes of collec-

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Hearings before a Subcommittee of the U. S. Senate Committee of the Judiciary on S. Res. 207, 75th Congress, 3d Session, p. 114."

[28] The policy of the Act, as stated in Sec. 1, is as follows:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*"

tive bargaining. Unless reinstatement is ordered, even though respondent ceases all its violations of the Act, the procedure of collective bargaining will continue to be regarded by the employees as one which can be sought only at the risk of their jobs.

3. *All of the strikers were properly ordered to be offered reinstatement despite respondent's reduction of its staff during the strike and its claim that seven of the strikers are inefficient*

Respondent further objects to the reinstatement order as too broad in that it orders *all* of the strikers to be offered reinstatement. The argument, in brief, is that the Board improperly required an offer of reinstatement to be made to employees whose jobs no longer exist, or who are deemed inefficient. The Board did not, of course, require respondent to *maintain* a larger staff than it thought necessary, or workers that it thought inefficient. Its decision expressly provides (R. 1967–1968) that, upon reinstatement of the strikers, respondent—

> may reorganize or reduce its staff in any non-discriminatory fashion it deems necessary * * *.

Respondent contends, however, that the order should have directed offers of reinstatement of strikers only to the extent that positions are available upon discharge of employees first hired after the unfair labor practices occurred. That form of order was formerly used by the Board, with the

further provision that strikers for whom there were no vacancies be placed on a preferential employment list. See, e. g., *Jeffery-DeWitt Insulator Co.*, 1 N. L. R. B. 618, enforcement granted, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731. The object of a reinstatement order, however, is to restore the situation, as nearly as possible, to that which existed prior to the unfair labor practices which caused the strike. Experience demonstrated that this form of order did not restore the *status quo* as far as it is reasonably possible to do so. Contrary to the intent of Section 13 of the Act, it penalized employees for exercising the right to strike, because it gave a preferred position to the employees who remained at work, or abandoned the strike before their fellows. If the strike had not occurred, all of the employees would have been at work when the reduction in personnel occurred, and those to be eliminated would have been selected from the entire staff, not from the strikers alone.

The Board, therefore, changed the form of its orders so that the strikers would not be required to bear alone a burden which they would have shared with the non-strikers had no strike occurred. As in the present case, it now requires the reinstatement of all strikers, regardless of the number of existing vacancies, and provides that after such reinstatement the staff may be reduced on any nondiscriminatory basis. E. g., *Louisville Refining Co.*, 4 N. L. R. B. 844; *Omaha Hat Corp.*, 4 N. L.

R. B. 878. This form of order has been enforced, as modified in respects here immaterial, in *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 F. (2d) 97 (C. C. A. 2d). It is also supported by the decision in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. There, prior to any unfair labor practice, four new employees were hired to take the place of striking employees, reducing, *pro tanto*, the number of positions available for strikers. Because of discrimination in excluding five strikers on the basis of union activity after the strike was over, the Board directed that the five be reinstated, with the right to the employer then to reduce its staff on a non-discriminatory basis. This Court, over the protest of the employer that there were no vacancies to which the reinstatements could be made, upheld the Board's order (304 U. S. at 345).

Respondent asserts that the decision in *Black Diamond S. S. Co.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579, is to the contrary. Manifestly, it is not. The Board's order there required the company to reinstate strikers "dismissing if necessary engineers employed for the first time" after the unfair labor practices. The court, citing *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731, interpreted the order as intended to effect reinstatement only to

the extent positions were vacant after the new employees were discharged. The Board did not take a contrary position in its brief, and the question here presented was not raised. Moreover, as we have pointed out, the Circuit Court of Appeals for the Second Circuit has subsequently enforced an order requiring reinstatement irrespective of existing vacancies. *National Labor Relations Board* v. *Hopwood Retinning Co., supra.*

The Board was also justified in reinstating the seven employees whom respondent claimed to be inefficient. Respondent itself had shown no intention to penalize their alleged inefficiency by the loss of their positions. Indeed, with respect to four of the seven, respondent had solicited them to return, which they refused to do without recognition of the Union (Graimer, Gartley, Johnson, Seifert, R. 82, 1074). Two others, Bissonnette and Fellens, were, as their foreman testified, among the less efficient in their respective departments (R. 1261–1263, 1270, 1277, 1281, 1285), but there is no evidence that there had been any intention to discharge them prior to the time they struck, or that others in the same rank of efficiency were also discharged. These six had never had their work criticized and all received one or more raises shortly before the strike (R. 779, 810, 798, 821, 763, 1053, 770–771). The seventh, Hoff, was a man of 74, whom respondent had replaced with a younger man (R. 1215). Again, there is no evidence that, but for the strike, the substitution would have occurred.

Respondent is, of course, under no obligation to retain any employee, and may reduce its staff after the reinstatement, on a basis of efficiency as well as of abolition of positions, whatever the situation in that regard may be when the order of the Board becomes effective. The order of reinstatement of the seven who were alleged to be inefficient simply prevents the burden of the elimination for inefficiency from falling solely on the strikers. In both respects the reinstatement order is as fair to respondent as would be one in the form for which it contends, and has the additional advantage of more nearly restoring the *status quo*. We submit that it cannot be said to constitute an abuse of discretion, and should be enforced. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.[29]

4. *The back pay provisions of the reinstatement order are entirely proper*

Respondent's final objection to the order requiring an offer of reinstatement to the strikers relates solely to that portion of the order which requires respondent to reimburse the employees to be reinstated for any losses they may suffer by reason of

[29] The opinion of the dissenting judge below states that the order should have been limited as respondent suggests (R. 1998). The opinion shows, however, that the respondent's right to eliminate unnecessary jobs after reinstatement was not fully recognized. The majority opinion did not find it necessary to pass on the matter.

its refusal of their application for reinstatement, by paying the equivalent of the wages they would have earned from such refusal to the offer of reinstatement, less sums earned elsewhere during that period (R. 1970–1971).

Respondent's objection to the back pay requirement is that it is a penalty designed to obtain compliance with the order without judicial review. On the contrary, the back pay provision is entirely remedial. But for respondent's unfair labor practices, the strikers would presumably have been at work at all times since February 17, 1937. Back pay might have been awarded from that date. The employees, however, voluntarily chose to cease work, rather than to utilize the procedure under the Act for the correction of unfair labor practices. Hence the Board awarded back pay only between the time when the individual striker manifested his desire to abandon the strike and return to work, and the date when he is finally permitted to do so. Until such desire is made manifest by application, the strikers would not be available for work and accordingly are not awarded pay for the period of the strike. After that time they would be ready for work and only respondent's failure to recognize his obligations under the Act would prevent them from earning wages.

Whether the application by the employees for reinstatement is made before or after the Board's order is irrelevant. Where, after an unfair labor practice, the strikers express their desire to return

to work on the employer's terms by applying for reinstatement prior to the Board's order, the Board may properly require back pay from the time of the employer's refusal to the time when reinstatement is granted. *Black Diamond S. S. Corp.* v. *National Labor Relations Board,* 94 F. (2d) 875, certiorari denied, 304 U. S. 579, *supra,* footnote 19. Where, as here, application for reinstatement, if it occurs at all, will be made first after the Board's order, a provision that back pay commences to accumulate at that time, unless the request is granted, is remedial, and proper under the Act. *National Labor Relations Board* v. *Oregon Worsted Co.,* 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9th).

The payments, in other words, are equally remedial no matter whether they begin to accrue immediately after the strike or at some later date. Nor do they become a penalty because they continue to accrue while the validity of the order is litigated. This is equally true of all back pay orders, many of which have been sustained by this Court. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Labor Relations Board* v. *Fruehauf Trailer Co.,* 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58; *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103; *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142; *Santa*

Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S. 453; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333; *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938. If there is any penalty here, it is on the employees, because they are not awarded back pay from the time of the strike, though they ceased work because of the employer's violation of the law.

Fundamentally, respondent seeks to be permitted to exercise its right to litigate, and when it is finally determined that it has no defense, to be relieved of all obligation to make restoration for the economic idleness which it has caused. Were it appealing from a money judgment against it, there can be no doubt that it would have to pay interest pending appeal. Certainly its present position finds no support in equity. Legally it necessitates setting at naught the express authorization in Section 10 (c) that back pay may be required as a remedial measure, and the further provision in Section 10 (g) that the commencement of review or enforcement proceedings "shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

We submit, therefore, that the provision of the Board's order requiring respondent to offer reinstatement to all striking employees, upon request, with back pay from the time of its refusal of any such application, is in all respects valid and proper and should be enforced.

B. THE ORDER OF THE BOARD REQUIRING RESPONDENT, UPON REQUEST, TO BARGAIN COLLECTIVELY WITH THE UNION, WAS VALID AND PROPER

Paragraph 2 (a) of the order of the Board (R. 1970) requires respondent, upon request, to bargain collectively with the Union as the exclusive representative of its employees in the unit found to be appropriate. The provision is the affirmative statement of the cease and desist portion of the order directed to the same violation contained in paragraph 1 (c) (R. 1970). It is the normal remedy in cases involving a violation of the obligation to bargain and has frequently been approved by the courts. *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515; *National Labor Relations Board* v. *Remington-Rand, Inc.,* 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *Black Diamond S. S. Co.* v. *National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, 304 U. S. 579; *National Labor Relations Board* v. *Hopwood Retinning Co.,* 98 F. (2d) 97 (C. C. A. 2d); *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. (2d) 146 (C. C. A. 5th); *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9th).

So much, we understand, respondent does not deny. Its argument is that in this case the normal remedy should not be applied, and is footed upon the assertion that the Union lost its majority after the unfair labor practices were committed, and therefore cannot now be recognized as the exclusive representative of the employees, even though it was entitled to that status on February 17, 1937.

Actually, the facts must be considered to be to the contrary. When the other provisions of the order are enforced, 93 employees named in the complaint will be reinstated, and persons hired since the plant reopened will be discharged. In addition to these 93, all of whom are members of the Union, there are 62 members who were voluntarily reinstated by respondent after the plant reopened (R. 1204, 1339). These members did not resign from the Union upon accepting offers of reinstatement (R. 292, 477–481). Although some of them have doubtless become members of the R. M. W. A. (R. 917), that membership, influenced and coerced by respondent, as we shall show below (pp. 74–77), cannot be considered as a genuine designation of a collective bargaining agent, nor can it be expected to continue after respondent ceases to violate the law and disestablishes the R. M. W. A. Consequently, it should be disregarded in determining the propriety of this portion of the order. Certainly, the Board is entitled to assume that, except for the effect of coercive practices which will cease with the enforcement of other

portions of the order, the Union majority proved at the hearing continues. As the Circuit Court of Appeals for the Second Circuit has recognized, unless some such presumptive authority is given to the Union, "the Act will not be workable." *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869–870 (C. C. A. 2d), certiorari denied, 304 U. S. 576. See also *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 96 F. 2d) 197 (C. C. A. 9th).

Moreover, apart from its sound basis in fact, this presumptive authority is in accord with the equities of the situation. On February 17, 1937, at least 155 of respondent's employees in the appropriate unit had joined the Union (R. 188, 1004, 1338–1343, 1656–1659, 1859), and even more would probably have designated it as their collective bargaining representative had an election been held on that day. Had the Union then been accorded the recognition to which it was legally entitled, its membership might reasonably have been expected to increase. See p. 81, *infra*. If what would, then, have been probably an overwhelming majority today is, in fact, less than a majority, that result is directly attributable to respondent's violations of the Act. The Board was plainly right in concluding (R. 1968):

> To refrain from ordering respondent to bargain collectively with the Union would be to permit the respondent to profit by its own wrongdoing.

The order does not, of course, give the Union a permanent status, and was not intended to do so. Upon the present record, it must be assumed, if the Act is to be made workable, that the Union represents a majority or will do so when the effects of respondent's unfair labor practices have been dissipated by the enforcement of the other portions of the order. But if that is not true in reality—if a sufficient number of the employees have transferred permanently their allegiance from the Union, that fact will soon appear under the normal operation of Section 9 of the Act, and will terminate all effect of paragraph 2 (a) of the order.

We submit, therefore, that the order in this respect should be enforced as written, leaving any changed conditions which may be brought to the court's or the Board's attention, after enforcement, to be dealt with by the court in enforcing the decree or by the Board under the statutory provisions relating to representation. But if the Court be of the opinion that the requirement may result in according to a labor organization an exclusive recognition to which it is not entitled under the Act, the Court, without denying enforcement to the order, may remove all doubt as to its effect by adopting the procedure of the Circuit Court of Appeals for the Second Circuit in the *Remington Rand* case. That court stated that it would enforce the order, but that it would condition the liability of the employer in contempt proceedings upon the result of an in-

quiry under the Act (Section 9 (c)) after the expiration of a reasonable time, during which the effects of respondent's illegal and coercive practice might be dissipated, the election to be held only if, upon presentation of the Union's proof of a majority, there was room for a *bona fide* doubt that the proofs establish the fact.[30] We do not believe that

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[30] The opinion stated (94 F. (2d) at 869–870):

"Section I (d), insofar as it merely compels the respondent to treat with the Joint Board, is within the language of section 8 (5), 29 U. S. C. A. § 158 (5) and was plainly warranted. However, that was nearly two years ago, and it is possible that the Joint Board will no longer represent a majority of the men, even after those who struck are restored to their jobs, as later sections of the order provide. The membership of a union is constantly changing, and it may at any time cease to represent the majority; if it does, it loses its power to bargain for the unit. When the authority of the representatives is in doubt, the Board must inquire and certify under section 9 (c), 29 U. S. C. A. § 159 (c), that their authority exists, or its order will be without support in the evidence. In the case at bar we could not in any event judge of the Joint Board's continued authority until the old men are reinstated, which the Labor Board has required—lawfully as we shall show later; and even after that has been done, it will still be impossible to judge, for not only will there have been many changes in personnel, but the men may not be of the same mind. Yet the order in form requires the respondent to recognize the Joint Board indefinitely in the future, and if that really assured them of a perpetual tenure, it would be objectionable for the reasons just given. It does not. Practically, the issue will arise only when there is a new occasion for negotiation, and the Joint Board demands renewed recognition as bargaining agent of the unit. Our order must not then guaranty their power, if it shall appear that they have lost it; but yet it should give them some presumptive authority, for otherwise

upon the facts in the present case such a condition is necessary, and suggest it only as an alternative in the event that the Court disagrees. Certainly, however, if it be adopted, every objection which respondent has to the order completely disappears.

III

THE BOARD'S FINDING THAT RESPONDENT HAD VIOLATED SECTION 8 (2) IS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THOSE PORTIONS OF THE ORDER BASED UPON THAT VIOLATION SHOULD BE ENFORCED

The Board found (R. 1962–1965) that respondent had violated Section 8 (2) of the Act in that it had dominated and interfered with the formation and administration of the Rare Metal Workers of America, Local No. 1, which had come into being at respondent's plant subsequent to the strike and the resumption of operations. Although respondent contended that there was no evidence to support these findings, the court below found that they were supported by substantial evidence (R. 1987, 1993–1994). Despite that conclusion, however, the court denied enforcement to the provisions of the Board's

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the act will not be workable. They will be the last representatives; and the respondent must challenge their power for this reason in good faith, and it must invoke an inquiry by the Labor Board under section 9 (c), 29 U. S. C. A. § 159 (c), if it does not treat with them. But if it does so, we shall not treat its refusal as a contempt, until after the Labor Board has certified the result. It will not be necessary to insert this proviso in the order; it is to be understood as incorporated into it. Section I (d) of the order is valid."

order requiring respondent to cease and desist from its violations of Section 8 (2) of the Act, and to withdraw recognition from and disestablish the R. M. W. A. as a collective bargaining representative of its employees. As we have heretofore explained (pp. 21–23) in connection with respondent's violations of Section 8 (1), which the court below also found to be supported by evidence but refused to enforce, we believe that the only issue with respect to the cease and desist portions of the order is whether the finding of violation is supported by substantial evidence. We shall first address ourselves to that question. In Part B, *infra*, we shall show that the provisions of the order requiring affirmative action because of this violation of the Act should also be enforced.

A. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S FINDING THAT RESPONDENT DOMINATED AND INTERFERED WITH THE FORMATION AND ADMINISTRATION OF THE R. M. W. A.

The character of the R. M. W. A. cannot be properly evaluated without reference to the situation prior to and at the time of its formation. As we have seen (pp. 29–31, *supra*) respondent had, prior to the strike, vigorously sought to foster an "inside" rival to the Union. When the Union attempted to bargain on September 10, 1936, Anselm had stated that respondent's policy was against recognition of "outside" unions, and had suggested that an "inside" organization be formed. Litera-

ture favoring an employee representative plan was furnished the committee, placed on the bulletin boards, and handed to each employee by his foreman. A petition was circulated by Anselm and the foremen expressing the signers' desire for an "inside" union, and threats and insinuations were used to induce the employees to sign. Indeed, the strike itself had been caused by respondent's firm refusal to deal with an "outside" union (see pp. 36–37, *supra*).

The plant reopened soon after the eviction of the strikers (R. 1182, 1329–1331). At that time the employees who insisted on bargaining collectively through representatives of their own choosing were out on strike. Only those willing to abandon efforts to achieve Union recognition had been reinstated (pp. 50–54, *supra*).

Under such circumstances it was almost inevitable that there should emerge in place of the Union a labor organization of the type which conformed to respondent's conditions and for which respondent had repeatedly and unmistakably expressed its preference. Actually, the R. M. W. A. was organized almost immediately (R. 962–963). An "organization committee" called on Anselm and obtained his approval of an "inside" union (R. 962–963, 999, 1008, 1024–1025). The new organization was incorporated by an attorney who did not charge for his services, which were extensive (R. 938, 1002, 1323–1324). It was immediately ac-

corded the use of respondent's mimeographing machines and bulletin boards (R. 1009, 1011, 1001–1002, 1323, 919, 933, 942, 964, 970–971, 984, 985, 988–989, 999, 1009, 1326–1327). Its ballot boxes were set up in respondent's buildings and the ballots were put in respondent's vaults for safe keeping (R. 920, 934, 941, 971, 994, 966, 972, 1000–1001, 1011, 1023). It was permitted to hold meetings in respondent's buildings (R. 999, 920, 1000, 932, 963–964, 969, 973, 977, 979, 984, 988, 993). Finally, its ballots and bylaws were printed free of charge by an unidentified benefactor (R. 1323–1324).

The bylaws provided that "outsiders" could neither belong to nor represent the new organization (R. 1026–1030). Its president was an employee hired by respondent from the National Metal Trades Association.[21] Most of the other persons nominated for office were employees hired as strikebreakers when the plant reopened (R. 970, 921, 924–925). The office of secretary was occupied by a deputy sheriff's daughter whom respondent had employed in appreciation of her father's services toward eviction of the sit-downers (R. 1122, 1125–1126, 1013). The new organization was accorded recognition as exclusive bargaining representative

[21] There were but two screw machine operators in the shop (R. 145–146, 1663), of whom the president of the R. M. W. A. was one (R. 927, 1012). The record shows that the two screw machine operators remained on strike and that upon reopening the plant respondent hired two screw machine operators from the N. M. T. A. (R. 345–346).

of the employees even before it had taken any steps to select a bargaining committee or to formulate what it would ask (R. 1002–1005, 944, 1019).

The evidence thus forms a familiar pattern. It establishes that respondent conceived the idea of an "inside" union, expressed its desire in no uncertain terms to its employees, and fostered and supported the organization which arose in response to this stimulus. Plainly, it supports the Board's finding of a violation of Section 8 (2) of the Act, and requires that the cease and desist provisions of the order based upon this violation should have been enforced. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *Consolidated Edison Co.* v. *National Labor Relations Board, supra.*

B. THE PROVISIONS OF THE ORDER BASED UPON THIS VIOLATION WERE VALID AND PROPER, AND SHOULD BE ENFORCED

Respondent, however, raises additional objections to those provisions of the order requiring it to withdraw recognition from and disestablish the R. M. W. A. as the collective bargaining representative of its employees. The argument is that the Board cannot require the withdrawal of recognition of the R. M. W. A. unless that organization is structurally incapable of functioning as a truly independent representative of the employees, or unless there is proof of continuing violation of Section 8 (2). We submit that the argument is without merit.

Apart from all other considerations, this provision of the order is valid as the necessary concomitant of the other portion of the order that respondent bargain with the Union as the exclusive representative of its employees. If that order is valid, as we believe that it is (pp. 68–73, *supra*), there is no further question here. Respondent cannot be allowed to treat with the R. M. W. A. because the duty to treat with the Union—the duly selected representative of its employees—imposes "the negative duty to treat with no other." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44–45; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 871 (C. C. A. 2d), certiorari denied, 304 U. S. 576.

In addition to that fact, however, respondent plainly is in error in asserting that the critical fact is the formal structure of the Union—its constitution, its bylaws, and the like. On the contrary, we submit that whether continued recognition of the R. M. W. A. would obstruct the employees' freedom of self-organization and genuine collective bargaining is a question of fact and a matter on which the Board was entitled to exercise its "judgment and discretion in determining * * * whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. In fact, in *National Labor Relations Board* v. *Pacific Grey-*

hound Lines, Inc., 303 U. S. 272, this Court held it proper to order the withdrawal of recognition from an organization where employer control was not inherent in its structure. The decision recognizes that domination by the employer, and hence a continuing interference with the employees' freedom of self-organization, may exist even though it is not made inevitable by a constitution and bylaws.

Similarly, there is no need to prove continuing violations. In both the *Pennsylvania Greyhound* and *Pacific Greyhound* cases the Circuit Courts of Appeals sustained the Board's orders in so far as they required cessation of action violative of Section 8 (2), but, considering those provisions adequate, refused to enforce the additional withdrawal of recognition requirements. This Court disagreed and sustained the order in all respects, recognizing that the effects of employer interference with and domination of a labor organization normally continues long after the actual violations of Section 8 (2) have ceased.

The argument of respondent seems to be based on a fundamental misconception of the purposes of the Act. Were it merely to stop unfair labor practices, there could be no valid objection to continued recognition of a labor organization once the employer's relations with it are conformed to the law. Cease and desist orders would be adequate, affirmative action would never be necessary, and no provision for it would appear in the Act.

But that is not the purpose of the Act. The prevention of unfair labor practices is simply a means to an end—industrial peace achieved by collective bargaining through fairly chosen representatives. The statute contemplates that the Board may require not only cessation of unfair labor practices, but also affirmative action to effectuate the policies of the Act. The question is not a formal one—is the R. M. W. A. "structurally incapable" of functioning, or is there proof of continuing violations. The question is simply whether the policies of the Act can best be effectuated without an affirmative order—whether there can be a fair choice of representatives and fair collective bargaining, under all the circumstances of the case, while respondent continues to recognize the R. M. W. A. The matter is necessarily one primarily within the discretion of the Board. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Clearly, there can be no possible showing here of an abuse of that discretion.

We have shown above that recognition was the culmination of many indicia of respondent's favor and support which the R. M. W. A. received. Respondent had, on numerous occasions, unequivocally expressed its desire that the employees select an "inside" union as their bargaining representative, and, as a phase of its campaign against the Union, actively solicited support for such an organ-

ization. Those who returned to work after the strike did so in full realization that they would have to acquiesce in respondent's selection of their means of representation. Without any doubt, respondent has guided and influenced the choice of a representative.

Unless this provision of the order be enforced, the organization thus chosen for the employees by respondent has the powerful fact of recognition in its favor. Recognition is the pivotal factor in collective bargaining. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515. By conferring or withholding recognition, an employer often has power to make or break a labor organization. Employees are clearly inclined to select as their representative an organization which has achieved recognition, and therefore promises the greatest effectiveness in bargaining. Indeed, in the *Pennsylvania Greyhound* case, this Court, in discussing the purposes of Congress with respect to the affirmative relief provisions of the Act, stated (303 U. S. at p. 267):

> It had before it the *Railway Clerks* case which had emphasized the importance of union recognition in securing collective bargaining, Report of the Senate Committee on Education and Labor, S. Rept. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an em-

> ployer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other.

Moreover, it is simply contrary to reason to urge, as respondent does, that a labor organization, the formation and administration of which have been interfered with and dominated by the employer, can suddenly become a fair and independent agent when the acts of interference and domination cease. The R. M. W. A. has obtained its members and its conduct has been directed by respondent's influence. Its policies, and its officers, have been shaped by respondent's interference and with a view to respondent's approval. Above all, the attitude of the employees toward it as respondent's creature has been definitely shaped. This was recognized in *Consolidated Edison Co.* v. *National Labor Relations Board:*

> The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence of violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair labor practices. Compare *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra.*

The statement is precisely applicable here. Continued recognition of the R. M. W. A. will permit

respondent to continue to accomplish the very objects at which its violations of Section 8 (2) were directed. If employers can, merely by ceasing such violations prior to issuance of the Board's order, reap the illegal benefits of those violations, no substantial abandonment of this type of interference with freedom of self-organization and collective bargaining may be expected. Proscription of unfair labor practices cannot be effective so long as a premium attaches to their commission. Only if the Board may restore the relationship between respondent and its employees to that which would have obtained had the statute not been violated do unfair labor practices become profitless. Such restoration cannot be had so long as the R. M. W. A., created and raised to a commanding position in the plant as a result of unfair labor practices, is accorded the recognition which it would never have earned without respondent's help.

Finally, respondent contends that the order is improper because there was proof only of "support," not of "domination" or "interference." The argument is based on an erroneous premise, and is, in any event, without merit. The evidence, summarized at pp. 74–77, *supra,* established that respondent dominated and interfered with the formation and administration of the R. M. W. A., as the dissenting judge below found (R. 1994), in addition to contributing various forms of support to it. But had respondent's acts constituted no more

than "support," the Board's order is nonetheless valid. What has been said above concerning the lasting effect of violations of Section 8 (2) and their perpetuation by means of recognition is equally applicable to all kinds of violations. The decisions of the Circuit Courts of Appeals have drawn no distinction between cases where domination was achieved in other ways, and those in which employer favor and support have secured a labor organization a commanding position in the plant. In either case the Board's orders requiring withdrawal of recognition have been sustained. *National Labor Relations Board* v. *Wallace Manufacturing Co.*, 95 F. (2d) 818 (C. C. A. 4th); *National Labor Relations Board* v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4th); *National Labor Relations Board* v. *Eagle Manufacturing Co.*, decided November 10, 1938 (C. C. A. 4th); *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9th).

IV

RESPONDENT WAS NOT DEPRIVED OF DUE PROCESS OF LAW BY THE BOARD'S RULINGS ON ITS APPLICATION FOR SUBPOENAS

Certain rulings by the Board on applications by respondent for subpoenas are asserted to have deprived it of the fair hearing guaranteed by the Fifth Amendment and the National Labor Rela-

tions Act. We submit that the Board's rulings were proper, and that, in any event, petitioner was not prejudiced in any way.

The basis of respondent's contention is really very limited, as a brief statement of the facts will show. On June 3, 1937, concurrently with filing its answer to the complaint, respondent made written application for the issuance of subpoenas requiring the attendance at the hearing of the 93 persons named in the complaint, 34 persons who had participated in the sit-down strike and violence and had thereafter been reinstated, and Robert E. Pilkington, a conciliator of the United States Department of Labor, and for a subpoena *duces tecum* directed to the Union requiring the production of certain records (R. 83–86). Putting to one side for the moment the request for the subpoena *duces tecum* and that directed to Pilkington, respondent's application was fully satisfied during the hearings. On June 10, 1938, the Board denied respondent's application without prejudice to a renewal thereof upon the completion of the Board's case, stating (R. 88–89) that it appeared—

> that many of the matters desired to be proven by the witnesses sought to be subpoenaed will be offered in evidence as part of the complainant's affirmative case.

This ruling was well within the discretion of the Board concerning the conduct of the hearing. *Philadelphia & Trenton R. Co.* v. *Stimpson,* 14 Pet.

448, 463; *Cox* v. *Hart*, 145 U. S. 376, 380–381; *Fidelity & Deposit Co.* v. *L. Bucki & Son Lumber Co.*, 189 U. S. 135, 143; *Franklin* v. *South Carolina*, 218 U. S. 161, 168. Its wisdom is demonstrated by the fact that the Board called as witnesses 85 of the 93 persons named in the complaint, and assured respondent that they could at any time be recalled (R. 584). Respondent's counsel thereafter stated that its application for subpoenas for these 85 persons had been fully satisfied (R. 1043).

At the close of the Board's case on Friday, June 18, respondent orally renewed its application for subpoenas. Ruling was reserved by the Trial Examiner until the next hearing day, Monday, June 21. On that day the application was continued under advisement (R. 1088, 1344) in order to determine the effect on the application of a stipulation which had that day been signed (R. 1779–1803). The stipulation set forth that the second group of 34 persons for whom subpoenas had been asked had participated in the seizure and occupation of the buildings and were thereafter reinstated (R. 1784). The Trial Examiner on Tuesday, June 22, asked respondent's counsel to file a written application for such subpoenas as he then desired (R. 1344–1347). On June 23, no written renewal has yet been filed and another oral renewal was made, but when respondent's counsel was asked by the Trial Examiner about the effect of the stipulation, he stated that respondent still desired the

duces tecum and the subpoena for Pilkington (R. 1344). The statement was meant, and understood, to be an agreement that the stipulation had removed the necessity for the other persons. If there can be doubt as to that, it is removed by the fact that when later that day respondent filed a written renewal of its application of June 3 with the Trial Examiner, it requested only the *duces tecum* and the subpoena directed to Pilkington (R. 89–91).

Thus respondent's application was fully satisfied with the exception of these two particulars. We shall examine them separately.

1. Respondent's renewal of its application for a *duces tecum* on June 23 (R. 89–91) was immediately submitted to the Board for consideration, pursuant to Section 11 (1) of the Act and Article II, Section 21 of the Board's Rules and Regulations, Series 1, as amended (R. 1565–1566, 1359). No word had been received from the Board by 3:15 P. M. June 24, when respondent concluded its case. By agreement of all parties respondent rested with leave to renew its case if subpoenas were granted. The Board did not offer any rebuttal and the hearing closed subject to the agreement (R. 1551–1552). A few minutes after the close of the hearing word was received from the Board by telephone that the application had been granted in so far as it asked the subpoena for Pilkington and a *duces tecum* requiring production of the membership records (R. 91, 1553–1554). The hearing was immediately

reconvened, the subpoenas were handed to respondent, and all records relating to membership in the Union were tendered to counsel (R. 1553–1554). Respondent objected that the subpoenas did not cover all of the Union records, that Pilkington was not then within the county, and that the subpoenas had been issued too late (R. 1555–1559). The Trial Examiner then offered respondent as much time as was necessary to examine the records and to serve Pilkington (R. 1559). Respondent, however, rejected the offer of further hearings and refused to examine the records or make use of the Pilkington subpoena (R. 1559–1560).[32] The Trial Examiner thereupon closed the hearing.

It is in the light of these facts that respondent's claim of prejudice must be judged. In view of them, and of the reasons advanced by respondent for desiring the materials sought, it is plain that there was no prejudice whatever.

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[32] The day before respondent's counsel had announced at the hearing that "Subject to testimony to be adduced by the witnesses and documents asked for in the application, we are ready to rest respondent's case. We do not want to make an offer of proof in connection with those items, if there is any chance of getting the subpoenas, and getting the materials * * *" (R. 1360). The record does not disclose the occurrence of any event which supports respondent's claim, upon receipt of the subpoenas, that it was then too late to use them (R. 1558). Respondent apparently refused the subpoenas and the proffered records because the Board had limited the scope of the subpoena *duces tecum* and respondent saw no utility in adducing further proof with regard to the membership of the Union.

Respondent's original application stated (R. 85) that it desired the production of the Union's—

> minute books, books of account, check books, membership cards, books and lists, and all correspondence relating to the solicitation of members among employees of the respondent or relating to the participation of said Lodge 66 or any of its officers, members, or agents, in the seizure on February 17, 1937, of Buildings 3 and 5 of respondent's plant and the retention thereof or maintenance of persons in occupancy of said buildings until February 26, 1937.

In its second application (R. 89–90) it renewed that request, and asked, in addition, the production of—

> all copies of charters, by-laws, articles of association, rules of eligibility, and any and all other rules and regulations governing the organization and conduct of said Lodge 66.

The first purpose for which these records were desired, as set forth in respondent's applications, was to meet the allegations of the complaint that the Union represented a majority of the production and maintenance employees (R. 90, 85). Production for that purpose was plainly unnecessary. During the hearing the membership cards had been produced, submitted to respondent for examination, and counsel had stipulated that the names on the cards conformed to employment records of persons employed by respondent between September 10,

1936, and February 17, 1937 (R. 307–311, 1063, 1338–1343). In addition, when the hearing was reopened on June 25, the Union produced, pursuant to the Board's subpoena, "such records as the Union has relating to the membership" (R. 1554), which respondent refused to examine or use.

The second stated purpose for which the Union's records were desired was to prove whether the seizure and retention of the plant "was a common enterprise of all of the members" of the Union, and whether the Union financed and directed these actions (R. 90, 85–86). Respondent apparently assumes that if a conspiracy were proved, every member of the Union, even those who took no part in the strike activities, technically would be "criminals" and not entitled to be reinstated. We submit that the element of conspiracy is totally irrelevant to any issue in the proceeding. Further, if the question were of any moment, any additional proof on whether seizure and retention of the plant was a common enterprise would be merely cumulative. The facts concerning the seizure had been the subject of a detailed stipulation (R. 1780–1785), and it had been proved without contradiction that the seizure and retention of the plant was planned and directed by the Union's bargaining committee, pursuant to authority voted it at a Union meeting to take whatever steps were necessary to obtain collective bargaining (*supra*, p. 36). There could be no question, on the record made, that the Union

had authorized and supported the sit-down strike.

The third stated purpose for which respondent desired production of the Union's records was to refute testimony adduced "with respect to the eligibility rules of said Lodge 66, its organization and existence as an alleged labor organization * * *" (R. 90). Here, too, evidence adduced upon these subjects could be cumulative only. The evidence was overwhelming that the Union admitted to membership all employees of respondent, except supervisory, clerical, laboratory, and engineering employees (R. 174, 179, 181, 182, 186, 189, 191, 193, 196, 197). The absence of written rules had been testified to (R. 245), and even if they had existed, they were irrelevant to any issue in the case. Respondent did not at any point of the hearing contend that the bargaining unit should be more inclusive than that claimed to be appropriate by the Board. As to whether the union was a "labor organization," respondent's own witnesses had testified that the Union attempted to bargain collectively with respondent on behalf of the employees. This circumstance fully established the status of the Union as a labor organization under Section 2 (5) of the Act. No evidence that could be produced under the subpoena could alter this proved fact.

We submit that the Board did not abuse its discretion in confining the subpoena *duces tecum* to requiring the production of membership records. The inference is strong that, in requesting the pro-

duction of various confidential records of the Union, respondent simply contemplated what the Trial Examiner termed a "fishing expedition" (R. 1566), without real cause to believe that the records would be of aid in preparation or proof of its case. No proper cause was shown for granting the respondent a right to go into the minute records, books of accounts, check books, and correspondence of a labor organization to which it was bitterly hostile.

2. As we have shown, respondent's request for a subpoena for Pilkington was granted on June 24, but respondent refused to use it (pp. 87–88, *supra*). On such facts, it seems perfectly clear that if there was any prejudice, it can be ascribed only to the refusal of respondent's counsel to accept the Trial Examiner's offer to adjourn the hearing until Pilkington could be served. But it is clear that respondent was not prejudiced in fact. In its original application on June 3 (R. 85) respondent stated that Pilkington's testimony was desired to prove—

> the forcible retention of possession of buildings forming part of respondent's plant * * * and other violence and threatened violence accompanying the alleged strike * * *.

The retention of the buildings and the violence were proved in detail by other witnesses, and were further elaborated in the stipulation of ~~July~~ June 21.

Consequently, in its application of June 23 (R. 90), respondent stated that the only proof it wanted from Pilkington was of "threats of violence against respondent and its officers" by persons named in the complaint. However, no officer of respondent who testified mentioned any threats against them or respondent, nor did any of the other witnesses. The sole mention of threats anywhere in the record is in these applications for subpoenas. Had any threats actually occurred, proof would seem to have been readily available to respondent from either the officers, the employees, or both.

For these reasons, we believe that there was plainly no prejudice to respondent. But even if there were, the complete answer to its contention that it was deprived of due process of law is that the Act afforded it a full remedy which it did not pursue. Under Section 10 (e) and (f) respondent could have applied to the Circuit Court of Appeals for leave to adduce whatever material evidence it had been denied an opportunity to elicit by reason of the Board's action. It did not avail itself of this remedy, and, consequently, has no ground for complaint here. *Consolidated Edison Co.* v. *National Labor Relations Board,* Nos. 19, 25, decided December 5, 1938.

CONCLUSION

Wherefore, the decision of the court below should be reversed, and the cause remanded with instruc-

tions to grant enforcement to the order of the Board.

Respectfully submitted.

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DECEMBER 1938.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *.

* * * * * *

(f) * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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